

Supreme Court, U. S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM 1975

No. **75-104**

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,
Petitioners.

v.

HUGH L. CAREY, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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Petitioners hereby request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered on January 6, 1975.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (per Judges Oakes and Frankel, respectively) are reported at 510 F.2d 512. (Appendix E, pp. 7a-50a). The opinion of the district court (per Judge Bruchhausen) is reported at 377 F.Supp. 1164 (App. H, pp. 53a-58a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1975 (App. E, pp. 5a-6a). A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on February 27, 1975 (Apps. C & D, pp. 3a-4a). On May 19, 1975, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 27, 1975 (App. B, p. 2a). On June 25, 1975, Mr. Justice Blackmun extended the time within which to file a petition to and including July 18, 1975, (App. A, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourteenth and Fifteenth Amendments were violated by a deliberate racial gerrymander under which election lines were drawn on a racial standard to secure ten districts with white voting populations at 35 percent or less.

2. Whether such a gerrymander was rendered constitutional by the fact that it was carried out under the instructions of the United States Department of Justice, purporting to implement the Voting Rights Act of 1965.

3. Whether a racial gerrymander can be viewed as "corrective action" to remedy past discrimination if there has been no affirmative finding by any court or government agency that there was past voting discrimination which required correction and if there is no rational relationship between the form of the remedy and the nature of the discrimination it assertedly "corrects."

STATEMENT

In January 1972, the New York Legislature enacted a legislative reapportionment law. Laws of New York (1972), ch. 11. As a result of subsequent judicial decisions — including particularly *Torres v. Sachs*, 73 Civ. 3921 (S.D.N.Y. 1973), *NAACP v. New York*, 413 U.S. 345 (1973), and *New York v. United States*, Civ. No. 2417-71 (D.D.C. 1974) — it was held that the 1972 reapportionment had to be submitted to the Attorney General or to a federal court for approval under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Such a submission was made on January 31, 1974. Sixty days later — on the last day when an objection could be asserted under the law — the Department of Justice (through Assistant Attorney General J. Stanley Pottinger) advised New York officials that (emphasis added):

On the basis of all the available demographic facts and comments received on these submissions as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of the race or color, we have concluded that the proscribed effect may exist in parts of the plans in Kings and New York Counties.

The grounds for this conclusion that the "effect" of the reapportionment "may" be to abridge the right to vote on the basis of race, as stated in the Assistant Attorney General's letter, were that one Senate district in Brooklyn "appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts," and that with regard to Brooklyn Assembly districts "the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts." The

letter stated that the Department knew "of no necessity for such configuration" and that it "believe[d] other rational alternatives exist."

The NAACP had filed a lengthy memorandum attacking the plan, had alleged that it was the product of purposeful racial discrimination and had claimed that its necessary effect was to abridge the right to vote in violation of the Fifteenth Amendment. The Department of Justice refused to make any finding of improper purpose or any affirmative finding that racial discrimination had resulted. Its determination that the reapportionment was unlawful was based entirely on the fact that the State had the burden of disproving racial effect and that burden had not been met. The responsible State officials disagreed with the conclusion,¹ but they believed that litigation over the validity of that evaluation would hinder the conduct of the 1974 elections. Accordingly, they determined to enact a reapportionment scheme that would satisfy the Department of Justice. Heading the group of professionals who were involved in this effort was Richard S. Seolaro, Executive Director of the Joint Legislative Committee on Reapportionment, which had been created by the New York Legislature in March 1965.

¹ There was testimony by some State officials indicating their own disagreement, and the brief for the State respondents in the Court of Appeals reported as follows (Brief for Appellees Wilson, Ghezzi, Anderson and Duryea, p. 7):

While neither the State defendants nor the Joint Legislative Committee on Reapportionment subscribed to the ruling of the Justice Department as expressed in the April 1, 1974 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time required that new legislation be enacted immediately to satisfy the objections of the Department of Justice. . . .

See also Complaint Exhibit VII, pp. 2-3 (Report of the Joint Legislative Committee).

Scolaro testified during a hearing in this case that in order to determine which changes would satisfy the Department of Justice and be approved under Section 5 of the Voting Rights Act, he had "one very lengthy meeting in person" and many telephone conversations with Justice Department attorneys to learn what would satisfactorily overcome the appearance of "concentration" and "diffusion." One of the "diffused" Assembly districts — to which the petitioners were assigned under the invalid 1972 apportionment — had a non-white population of 61.5 percent, and Scolaro was told that this was not a sufficiently "substantial" nonwhite population. He then testified as follows:

I said how much higher do you have to go? Is 70 percent all right? They didn't say yes or no, but they indicated it is more in line with the way we think in order to effect the possibility of a minority candidate being elected within that district.

I suggested 65 percent. It came out at that time that it is a figure used by the NAACP in numerous briefs and other documents.

I got the feeling, and I cannot vouch for this as a matter of having been specifically said, but I left that meeting indicating that 65 percent would be probably an approved figure.

Scolaro and his staff thereafter formulated their reapportionment plan on the assumption that "anything under 65 would not be acceptable." Although the approximately 30,000 citizens who are represented by the petitioners comprise a cohesive group that has historically been kept in a single State Assembly and Senate district, they could not be kept unified in such a district unless the nonwhite population fell below 65 percent. A plan that would have increased the nonwhite population of the petitioners'

Assembly District while maintaining the group together was rejected as inadequate. Scolaro testified that such a plan was cast aside because "it was our determination at that time, after all our consultation with the Justice Department, that increasing a percentage from 61.5 to 63.4, would not be acceptable to effect compliance." Consequently, the Commission proposed — and the New York legislature quickly enacted — the laws being challenged here, which satisfied the Justice Department's 65 percent standard and resulted in significant dilution of the petitioners' political effectiveness by dividing the community they represent between two Senate and Assembly districts. Laws of New York (1974), chs. 588, 589, 590, 591 and 599.

The petitioners are representatives of the Jewish residents of the Williamsburgh area of Brooklyn, who are overwhelmingly adherents of the Orthodox Jewish faith and form a closely knit community of *Hasidim*. The Williamsburgh *Hasidim* began to settle in substantial numbers in the area during and after World War II, with the early settlers being refugees from the Nazi holocaust and survivors of the concentration camps. For the past 30 years, the community has developed and grown to its present size as a substantially self-sustaining and law-abiding group. Its distinctive religious rules and practices, which affect appearance and dress, make its members immediately identifiable and subject them to substantial discrimination and hostility. The community's leaders have been obliged to turn increasingly to their elected officials to secure protection for their right to live peacefully and securely. While other white residents of Williamsburgh have, during recent years, left the region and moved elsewhere, the *Hasidic* community has remained. As a result, it now finds itself surrounded by neighborhoods that are heavily black or Puerto Rican.

When the *Hasidic* community learned that it was going to be split in half by the 1974 reapportionment — which it

viewed as "devastating" and "a direct slap in the face" — it instituted the present action challenging the 1974 reapportionment as a violation of the Fourteenth and Fifteenth Amendments. The suit was filed on June 11, 1974, less than two weeks after enactment of the 1974 laws. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343 and 1357.

Petitioners sought immediate relief against implementation of the new reapportionment plan, which had not yet been approved pursuant to Section 5 of the Voting Rights Act. After a hearing held on the first day for signing nominating petitions, Judge Bruchhausen initially indicated he would grant a temporary restraining order but then changed his mind. A full evidentiary hearing on a motion for preliminary injunction was held on June 20, 1974.²

² While the motion was under advisement, on July 1, 1974, the Department of Justice issued a letter approving the new reapportionment plan. A "Memorandum of Decision" accompanied the approval letter, and it expressed the Justice Department's theory that blacks and "Puerto Ricans in New York" are protected by the Fifteenth Amendment and the Voting Rights Act, and that "nothing revealed by our review of the circumstances surrounding the adoption of the Fifteenth Amendment, the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political subdivisions under the Act . . . indicates that Hasidic Jews or persons or Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act." The Memorandum then expressed the view, supported by no specific evidence, that "where black or Puerto Rican candidates have 'white' opposition, the two groups tend to unite behind the 'minority' candidate." On these premises, the 1974 reapportionment was approved because of the satisfactory combined "nonwhite" population figures in each of the new districts. The argument of Puerto Rican groups that the 1972 reapportionment had given Puerto Ricans a more dominant minority position in some election districts and that the Puerto Ricans were outnumbered by blacks in *all* election districts under the 1974 reapportionment was rejected.

(continued)

On July 25, the district court denied the motion for preliminary injunction and granted the defendants' motions to dismiss the complaint. Judge Bruchhausen held that the claims were "untenable" because only political subdivisions may bring actions under the Voting Rights Act and because there is no constitutional right to "community recognition" in legislative apportionment. So far as the reliance on racial criteria was concerned, Judge Bruchhausen held that "racial considerations have been approved to correct a wrong." He did not specify what "wrong" was being corrected here, or how the "correction" was implemented by the 65 percent quota (App. 56a-58a).

Two judges of the court of appeals held that the dismissal was correct. They noted that they did "not necessarily share" the Justice Department's limited view of the reach of the Voting Rights Act, and that there was "no reason . . . that a white voter may not have standing, just as a nonwhite voter, to allege a denial of equal protection as well as an abridgment of this right to vote on account of race or color . . . regardless of the fact that the fourteenth and fifteenth amendments were adopted for the purpose of ensuring equal protection to the black person" (App. 24a). They held, however, that since there was no deliberate legislative purpose "invidiously to cancel out or minimize the voting strength of white voters in Kings County," the constitutional issue was whether "districting on racial lines is per se unconstitutional" (App. 27a-28a). In this regard, the majority asserted that since the Justice Department had concluded that the 1972 apportionment involved "un-

² (continued)

And the claims of the present petitioners and other ethnic groups of white citizens were summarily denied — even though the Department recognized that the *Hasidic* Jewish community in Williamsburgh and the ethnic communities in North Brooklyn had been "affected" — because "the issues raised are not ones which the Attorney General has authority to determine."

derrepresentation of race," the Attorney General "necessarily had to think in racial terms in considering his approval of the 1974 lines." They concluded, accordingly, that racial districting is valid if it "is in conformity with the unchallenged³ directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or nonwhite . . ." (App. 31a-32a).

Judge Frankel dissented because, in his view, the drawing of district lines "with a central and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts" violates the Constitution (App. 32a-33a). Judge Frankel noted that the quota requirement could not have been imposed "to correct a wrong" because neither the legislature nor any responsible official — neither the district court nor the majority of the court of appeals — found the 65 percent rule "suited as a remedy for the unsurmounted objections of the Attorney General to the 1972 lines" (App. 40a). Indeed, as Judge Frankel noted, "nobody professes to have determined that the quota requirement was necessary or proper as a remedy for supposed wrongs" (App. 41a). In addition, Judge Frankel observed that the record provided no reasonable basis, let alone any compelling necessity, for "a scheme of nonwhite control (and white subordination) through a predetermined minimum of 65% per selected district" (App. 40a). He concluded that this was "a case of racial quotas that are evil and dangerous because there is no semblance of justification for them" and that the laws should, therefore, be found unconstitutional (App. 50a).

³ The "directive" was "unchallenged," of course, because only the State is authorized to "challenge" it directly and it chose not to do so because of the time constraints. An action was, in fact, brought by individual legislators in the District Court for the District of Columbia, and it was dismissed.

REASONS FOR GRANTING THE WRIT

1. This Court has consistently condemned, in most vigorous terms, any form of deliberate racial discrimination in voting. As recently as June 24, 1975, in *City of Richmond v. United States*, No. 74-201, a Court majority recognized that "voting changes taken with the purpose of denying the vote on the grounds of race or color" are invalid no matter what their actual effect may be (Slip Opinion, p. 19). This case presents a clear undisputed instance of purposeful racial discrimination and the important question it raises is whether such deliberate action is constitutionally different when the victims' skin is white than if it is black, brown, red or yellow. There could surely be no doubt that if a local government deliberately gerrymandered its districts to keep black voters or Indians at a 35-percent-or-less proportion, the apportionment would be invalid. The same rule applies when this quota governs white voters.

The decision in *City of Richmond v. United States*, *supra*, eliminated the sole legal justification for this racial classification relied upon by the district court, the majority of the court of appeals, and the Department of Justice. They all asserted, in substance, that it is permissible to engage in racial discrimination in drawing district lines if it is necessary "to correct a wrong" (App. 58a). But this Court's ruling in *City of Richmond* was that even where there has been deliberate discrimination against black voters by past official action, the remedy may not extend to the invalidation of voting standards which are now supported by "objectively verifiable legitimate reasons" (Slip Opinion, p. 15). If the original annexation in *City of Richmond*, found by overwhelming proof to be flagrantly and deliberately discriminatory, did not warrant remedial measures that would maximize the voting power of the city's black population, it follows, *a fortiori*, that the far less egregious failure of New York State to prove the non-racial

effect of its 1972 reapportionment did not justify the imposition of a remedy such as a 65% racial quota. Correction of past discrimination by race-conscious remedies are much less appropriate in New York's case than in Richmond's.

2. The issues presented here are related not only to those in the *City of Richmond* case, but also to the questions under consideration by this Court in *Beer v. United States*, No. 73-1869, returned to the calendar for reargument on April 23, 1975. Both *Beer* and *City of Richmond* concern the validity of Justice Department disapprovals of a particular new "qualification, prerequisite, standard, practice or procedure with respect to voting" on records amply demonstrating past practices which were racially discriminatory. The record in this case contains no finding of past racial discrimination. Nor is there, in this case, a direct challenge to the Department of Justice invalidation of New York's law. Because there was no time to sue, the New York authorities accepted the Department of Justice conclusion and, pursuant to official directives that were at least implicit, fixed racial quotas for ten election districts. The petitioners represent citizens personally affected by these actions.

The constitutional questions are, therefore, complementary to those in *Beer* and *City of Richmond*, insofar as they concern the limits of the Attorney General's power under the Voting Rights Act. May he, absent any finding of purposeful past racial discrimination, strike down a reapportionment plan on population statistics simply by using the shift of burden of proof authorized in *Georgia v. United States*, 411 U.S. 526 (1973)? Is the "highly concentrated" and "significantly diffused" standard applied by the Attorney General a permissible measure to determine the effect of a reapportionment under the Voting Rights Act and the Fifteenth Amendment? If the Attorney General may use this procedure and these standards to invalidate a reapportionment plan, is it constitutionally permissible for him

to advise State officials that adherence to a racial quota will "correct" the inadequacy of the plan that he has rejected? And may State officials, themselves obliged to accord to all persons the equal protection of the laws, carry out such a suggestion by drawing district boundaries primarily along racial lines?⁴

The impact of the racial criteria on the plaintiffs is clear from this record. Mr. Sclaro testified unequivocally as follows (emphasis added):

Q. So that your reason for dividing the Hasidic community was to effect compliance with the Department of Justice determination, and the minimum standard they impose — they appear to impose?

A. *That was the sole reason.* We spent over a full day right around the clock, attempting to come up with some other type of districting plan that would maintain the Hasidic community as one entity, and I think that evidenced clearly by the fact that the district is exactly 65 percent, and it's because we went block by block and didn't go higher or lower than that, in order to maintain as much of the community as possible.

⁴ It is no answer to say, as the respondents might, that these issues should be treated in suits under Section 5 brought by a State or political subdivision against the United States or the Attorney General under the Voting Rights Act. *First*, Section 5 expressly preserves, in its next-to-last sentence, all privately instituted judicial remedies. *Second*, there are and will be many situations where local governments will find acceptance of the Attorney General's illegal directive to be the cheapest and least disruptive course — even if it be at the expense of some white minority. That is precisely what happened here. The minority should not then be denied its judicial remedy because other government agencies have joined in the unconstitutional action of the Attorney General of the United States.

The majority of the court below rejected the petitioners' constitutional challenge on the ground that the racially motivated gerrymander, even if otherwise impermissible, is lawful if directed or approved by the Attorney General. This assumes, however, that the Attorney General is acting constitutionally — a position we challenged below by making the Attorney General a party to this action, and that we continue to challenge here.

3. The basic constitutional question is, we believe, of great national importance. In an age when much progress is being made to remedy racial discrimination and correct past inequities, a real danger has emerged that the corrective process will wreak new wrongs on new victims. The record of this case is, we believe, an illustration of such an unfortunate result. Acting for motives that were doubtless benign, the Department of Justice has seriously crippled the developing political consciousness of a small ethnic group that has heretofore been suspicious of the secular society in which it lives, has been most hesitant to participate in that society's activities, and has been the victim of much discrimination.

The issue presented here may be, as the majority below recognized, "analogous" to the question argued but not decided in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). We believe, however, that its resolution is much easier than that of *DeFunis*. Much greater harm results from a racial quota system in voting than in public higher education. More than ten years ago, this Court unanimously recognized in *Anderson v. Martin*, 375 U.S. 399, 402 (1964), that our democratic system cannot tolerate governmental action to "induce racial prejudice at the polls." In a separate opinion in *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964), Mr. Justice Douglas observed that the drawing of electoral lines on a racial basis encourages groups to "seek not the best representative but the best racial or religious partisan." Such a result, he said, "is at war with the democratic

ideal." But what purpose is served by demanding that ten election districts in Brooklyn have at least 65 percent non-white population other than to encourage that population to vote on the basis of race?

This Court and lower courts have repeatedly emphasized that "[f]ramers of voting districts are required to be color blind." *Ince v. Rockefeller*, 290 F. Supp. 878, 884 (S.D.N.Y. 1968). *E.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973), quoting from *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *White v. Register*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-160 (1971); *Mann v. Davis*, 245 F. Supp. 241, 245 (E.D. Va.), *aff'd*, 382 U.S. 42 (1965) ("No line may be drawn to prefer by race or color."); *Kilgarlin v. Martin*, 252 F. Supp. 404, 437 (S.D. Tex. 1966), *rev'd on other grounds*, 386 U.S. 120 (1967); *Cousins v. City Council of Chicago*, 466 F.2d 830, 842-843 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1973); *Ferrell v. Oklahoma*, 339 F. Supp. 73, 83 (W.D. Okla.), *aff'd*, 409 U.S. 939 (1972); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1972); *Howard v. Adams County Board of Supervisors*, 453 F.2d 455, 457-460 (5th Cir. 1972); *Dobson v. Mayor and City Council of Baltimore*, 330 F. Supp. 1290, 1296 (D. Md. 1971). Judge Frankel properly observed that the contrary rule "offends against the most fundamental tenets of our constitutional scheme" (App. 43a). It should be clear by now that justice will be achieved in this nation not by drawing convoluted district lines that will aggregate "nonwhite" residents in a manner maximally designed to elect "nonwhite" legislators but by encouraging all residents to vote for the best possible representatives to speak for them — irrespective of the candidates' race. The constitutional position taken by the Department of Justice and by the majority of the court of appeals retards that goal rather than advances it.

4. The decision of the majority conflicts with decisions of this Court not only on the fundamental issue whether race-

consciousness is permissible in districting but also on the more narrow question of remedy. In *Milliken v. Bradley*, 418 U.S. 717, 738 (1974), this Court quoted its observations in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), that "federal remedial power may be exercised 'only on the basis of a constitutional violation' and '[a]s with any equity case, the nature of the violation determines the scope of the remedy.' "

Even if it were constitutionally permissible to utilize some racial standard in electoral districting to "correct" past violations, there would have to be a rational relation between the particular remedy imposed — in this case a minimum 65 percent "nonwhite" population in ten districts — and the wrong that is sought to be corrected. Judge Frankel's dissent noted the arbitrariness of the racial standard imposed here (App. 46a):

If people have been forced in or out because of race, then, of course, the fences must be torn down and the districts in this manner redrawn lawfully. That is, the forbidden use of race must be overcome by some condign remedy. But what is the nature of the pre-existing wrong that could make it condign or permissible to set up a minimum quota of 65% or any percentage for one race or group of races? This record and the majority opinion will be searched in vain for an answer to this question.

The short of the matter is that if the 65 percent quota "directed" or "approved" by the Attorney General is a "remedy" for any constitutional wrong, it is a "remedy" that is not authorized by any decision of this Court and one that conflicts directly with this Court's view of proper remedies in *Milliken v. Bradley* and in *City of Richmond v. United States*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully yours,
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Attorney for Petitioners

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-953

**UNITED JEWISH ORGANIZATION OF
 WILLIAMSBURG, INC., ET AL.,**
Petitioners

v.

HUGH CAREY, ET AL.

**ORDER FURTHER EXTENDING TIME TO FILE
 PETITION FOR WRIT OF CERTIORARI**

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including July 18, 1975.

/s/ Harry A. Blackmun
 Associate Justice of the Supreme
 Court of the United States

Dated this 25th
 day of June, 1975.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

 No. A-953

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURG, INC., *ET AL.*
Petitioners,

v.

HUGH CAREY, *ET AL.*

 ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel
for petitioner(s),

IT IS ORDERED that the time for filing a petition for
writ of certiorari in the above-entitled cause be, and the
same is hereby, extended to and including June 27, 1975.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 19th
day of May, 1975.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Court House, in the City of New York, on the twenty-
seventh day of February, one thousand nine hundred and
seventy-five

Present: HON. JAMES L. OAKES
Circuit Judge
HON. MARVIN E. FRANKEL
HON. ROBERT J. KELLEHER
District Judges

UNITED JEWISH ORGANIZATIONS OF WILLIAMS-
BURG, INC., ALBERT GRIEDMAN, HENRIETTE
FRIEDMAN, HELEN GREENWALD, HAROLD KLAGS-
BALD, LOPOLD LEFKOWITZ, DAVID LINDNER,
ALEXANDER W. NOJOVITS, JULIUS TEMPLER,
Plaintiffs-Appellants,

v.

74-2037

MALCOLM WILSON, JOHN GHEZZI, WARREN AN-
DERSON, PERRY DURYEA, JR., NEW YORK CITY
BOARD OF ELECTIONS, ATTORNEY GENERAL OF
THE UNITED STATES,

Defendants-Appellees.

A petition for a rehearing having been filed herein by
counsel for the Plaintiffs-Appellants
Upon consideration thereof, it is
Ordered that said petition be and hereby is denied

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX D**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of February, one thousand nine hundred and seventy-five.

UNITED JEWISH ORGANIZATIONS OF WILLIAMS-
BURG, INC., ALBERT GRIEDMAN, HENRIETTE
FRIEDMAN, HELEN GREENWALD, HAROLD KLAGS-
BALD, LOPOLD LEFKOWITZ, DAVID LINDNER,
ALEXANDER W. NOJOVITS, JULIUS TEMPLER,
Plaintiffs-Appellants,

v.

74-2037

MALCOLM WILSON, JOHN GHEZZI, WARREN AN-
DERSON, PERRY DURYEA, JR., NEW YORK CITY
BOARD OF ELECTIONS, ATTORNEY GENERAL OF
THE UNITED STATES,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiffs-Appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Wilfred Feinberg
Acting Chief Judge
WILFRED FEINBERG

APPENDIX E**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a stated Term of the United States Court of Appeal for the Second Circuit, held at the United States Court-house in the City of New York, on the sixth day of January one thousand nine hundred and seventy-five.

Present: HON. JAMES L. OAKES

Circuit Judge

HON. MARVIN E. FRANKEL

HON. ROBERT J. KELLEHER

District Judges

UNITED JEWISH ORGANIZATIONS OF WILLIAMS-
BURG, INC., ALBERT GRIEDMAN, HENRIETTE
FRIEDMAN, HELEN GREENWALD, HAROLD KLAGS-
BALD, LEOPOLD NOJOBITS, JULIUS TEMPLER,
Plaintiffs - Appellants,

v.

74-2037

MALCOLM WILSON, JOHN GHEZZI, WARREN AN-
DERSON, PERRY DURYEA, JR., NEW YORK CITY
BOARD OF ELECTIONS, ATTORNEY GENERAL OF
THE UNITED STATES,

Defendants-Appellees.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK**

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk
By /s/ Vincent A. Carlan
Chief Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1251—September Term, 1973.

(Argued August 16, 1974 Decided January 6, 1974.)

Docket No. 74-2037

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURG, INC.,
ALBERT FRIEDMAN, HENRIETTE FRIEDMAN, HELEN GREEN-
WALD, HAROLD KLAGSBALD, LEOPOLD LEFKOWITZ, DAVID
LINDNER, ALEXANDER W. NOJOVITS and JULIUS TEMPLER,

Plaintiffs-Appellants,

v.

MALCOLM WILSON, Governor of the State of New York;
JOHN GHEZZI, Secretary of the State of New York;
WARREN ANDERSON, Temporary President of the New
York Senate; PERRY DURYEA, JR., Speaker of the New
York Assembly; NEW YORK CITY BOARD OF ELECTIONS;
and WILLIAM B. SAXBE, Attorney General of the United
States,

Defendants-Appellees,

NA.A.C.P., et al.,

Intervenors-Appellees.

Before:

OAKES, Circuit Judge,

FRANKEL and KELLEHER, District Judges.*

* Of the Southern District of New York and the Central District of California, respectively, sitting by designation.

Appeal from orders entered in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*, denying a preliminary injunction and dismissing a complaint which alleged that impermissible racial criteria, violating the fourteenth and fifteenth amendments, were used in the drawing of certain New York State Senate and Assembly districts.

Affirmed.

NATHAN LEWIN, Washington, D. C. (Miller, Cassidy, Larroca & Lewin; Dennis Rapps, Brooklyn, New York, of counsel), *for Plaintiffs-Appellants*.

GEORGE D. ZUCKERMAN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, New York, New York, of counsel), *for Defendants-Appellees Wilson, Ghezzi, Anderson and Duryea*.

GERALD W. JONES, Attorney, Department of Justice, Washington, D. C. (David G. Trager, United States Attorney for the Eastern District of New York, J. Stanley Pottinger, Assistant Attorney General, Walter Gorman and S. Michael Seadron, Attorneys, Department of Justice, Washington, D. C., of counsel), *for Defendant-Appellee Saxbe*.

IRWIN L. HERZOG, Assistant Corporation Counsel for the City of New York, *for Defendant-Appellee The Board of Elections of the City of New York*.

ERIC SCHNAPPER, New York, New York (Jack Greenberg, of counsel), *for Intervenor-Appellees*.

OAKES, *Circuit Judge*:

This appeal brings us close to full circle in respect to reapportionment—all the way back from *Baker v. Carr* almost to *Colegrove v. Green*. It poses the subtle question whether a federal court should interfere to invalidate on fourteenth or fifteenth amendment grounds a state legislative districting plan for two counties specifically drawn to ensure nonwhite voters a "viable majority" or a "realistic opportunity for minorities to elect a candidate of their choice"¹ in state senatorial and assembly districts. The question is made no less complex by virtue of its being brought by a group of Jewish organizations and individuals, speaking for the *Hasidic* community in the Williamsburgh section of Brooklyn, New York, but addressing themselves to the effect of the districting upon them *qua* white voters as well as *qua* members of the *Hasidic* community. Further added to this recipe for judicial perplexity is the fact that the districting scheme was enacted after disapproval of a prior districting by the Attorney General of the United States (hereinafter "the Attorney General") on the basis of the State's abridgement of the right of nonwhites to vote, such objection operating to forbid utilization of the prior districting by virtue of the applicability of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.*, to New York's Bronx, Kings and New York Counties. The district court dismissed the complaint, holding that

¹ These are the words of a Memorandum of Decision, Nos. V6541-47, at 15, 18, of the United States Department of Justice attached to a letter of the Assistant Attorney General of the United States, approving the 1974 districting here in issue.

the plaintiffs had suffered no cognizable injury and that "racial considerations" had been permissibly employed in the later districting "to correct a wrong." We affirm, for reasons that differ somewhat.² A history of the controversy must be set forth to crystallize the issues.

FACTS

We commence with July 31, 1970, when the Attorney General of the United States filed with the Federal Register his determination that New York on November 1, 1968, maintained a test or device (a literacy test) as defined in Section 4(c) of the Voting Rights Act as amended, 42 U.S.C. § 1973b. 35 Fed. Reg. 12354. Then on March 27, 1971, the United States Bureau of the Census also determined that Bronx, Kings and New York Counties were subject to Sections 4 and 5 of the Voting Rights Act, 42

² Because the statutes in question are not of statewide applicability, a three-judge court is not required. 28 U.S.C. § 2281; *Board of Regents of the University of Texas System v. New Left Education Project*, 404 U.S. 541, 542-43 (1972). Even though the statutes involve the State legislature, they relate only to Kings and New York Counties (plaintiffs seek relief only in Kings County) and are therefore solely of local impact. *Ince v. Rockefeller*, 290 F. Supp. 878, 882 (S.D.N.Y. 1968). Although the Supreme Court did hear an appeal in *Wright v. Rockefeller*, 376 U.S. 52 (1964), involving a constitutional challenge to four congressional districts in one county in New York, which was brought before and heard by a three-judge district court, the Court did not discuss the basis of its jurisdiction. Nor did any of the three opinions below in *Wright v. Rockefeller*, 211 F. Supp. 466 (S.D.N.Y. 1962), explain why convening the three-judge court was necessary. Even if the Court were sub silentio approving the propriety of three-judge courts hearing cases of purely local impact, such approval has been overruled by the more recent *Board of Regents v. New Left Education Project*, *supra*, and cases cited therein. See also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

While originally there was a claim under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which would have required a three-judge court under *Allen v. State Board of Elections*, 393 U.S. 544, 545-46 (1969), that claim was dismissed by the district court and is not set forth here.

U.S.C. §§ 1973b³ and 1973c,⁴ since a literacy test was used in those counties prior to 1970 and less than 50 per cent of the voting age residents voted in the presidential elec-

3 42 U.S.C. § 1973b:

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the pres-

(footnote 4 appears on following page)

tion of 1968. 36 Fed. Reg. 5809 (1971). The State of New York filed a complaint on December 3, 1971, in the United States District Court for the District of Columbia

3

(continued)

idential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

....

4 42 U.S.C. § 1973c:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have

for a declaratory judgment exempting the three affected counties under § 4(a) of the Act, 42 U.S.C. § 1973b(a). This judgment was granted with Justice Department consent on April 13, 1972. *New York State v. United States*, Civil No. 2419-71 (D.D.C.) (unreported). The NAACP unsuccessfully appealed to the United States Supreme Court the denial of its leave to intervene in the District of Columbia case. *NAACP v. New York*, 413 U.S. 345 (1973). But after District Judge Stewart's decision granting a preliminary injunction in *Torres v. Sachs*, 73 Civ. 3921 (S.D.N.Y. Sept. 26, 1973) (failure to provide Spanish translation of ballot contravened Voting Rights Act), the Justice Department successfully reopened the declaratory judgment action and obtained two orders from the District of Columbia District Court, one on January 10, 1974, directing the State on behalf of the three counties to comply with the filing requirements of § 5 of the Act, 42 U.S.C. § 1973c, and the second on April 30, 1974, denying the State's motion for summary judgment. Those orders were summarily affirmed the other day by the United States Supreme Court. *New York v. United States*, 43 U.S.L.W. 3238 (Oct. 22, 1974).

the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2281 of Title 28 and any appeal shall lie to the Supreme Court.

We then return to 1972 when, in January, the State of New York altered the Senate and Assembly lines in Kings County in view of population changes evident in the 1970 census. Laws of New York (1972) Ch. 11. Under that reapportionment, the *Hasidic* community was included within the 57th State Assembly District and the 17th State Senate District. As a result of the January 10, 1974, decision of the District of Columbia District Court, however, New York was required to obtain and on January 31, 1974, did seek approval of the Attorney General under Section 5 of the Voting Rights Act as to the 1972 redistricting in Bronx, Kings and New York Counties. This is because a legislative reapportionment is a change of "standard, practice, or procedure with respect to voting" within § 5 of the Act, 42 U.S.C. § 1973c. *Georgia v. United States*, 411 U.S. 526 (1973). On April 1, 1974, the Assistant Attorney General in charge of the Civil Rights Division, J. Stanley Pottinger, advised the New York Attorney General's office that while the majority of the 1972 redistricting was unobjectionable "we cannot conclude . . . that those portions [relating to certain districts in Kings and New York Counties] of these redistricting plans will not have the effect of abridging the right to vote on account of race or color" by virtue of overly concentrating minority populations in certain senate and assembly districts while "diffusing" the remaining minority population adjoining those districts into a number of other districts. Thus, *it is because New York had failed to comply with the Voting Rights Act in the first instance* (by way of having a "device" with fewer than 50 per cent voting) *that it fell afoul of that Act and was in a position* (for which it will remain for ten years under § 4(a), 42 U.S.C. § 1973b(a)) *where its districting is subject to disapproval of the Attorney General* if, for example, its proposed lines are drawn so as to deny or abridge the rights

of minority citizens to vote. Even though the State defendants here disavow the determination of the Attorney General of April 1,⁵ that determination was *not* appealed by the State of New York, its sole appellate remedy being by way of action in a three-judge District Court for the District of Columbia under § 5 of the Act, 42 U.S.C. § 1973c. Thus we can say unequivocally that the State of New York was in a position where it *had* to obtain Department of Justice approval of *new* district lines before it could hold a proper election under the Voting Rights Act.

The State proceeded to draw new lines and to obtain such approval and it is those lines which are under attack here. The New York Joint Legislative Committee on Reapportionment met, under the gun so to speak,⁶ to draw lines and prepare a series of laws which were enacted in special session on May 29 and 30, 1974. Laws of New York (1974) Chs. 588, 589, 590, 591 and 599. These lines were drawn, Richard S. Scolaro, the executive director of the Joint Committee on Reapportionment testified be-

⁵ That determination was that

However, on the basis of all the available demographic facts and comments received on these submissions as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color, we have concluded that the proscribed effect may exist in parts of the plans in Kings and New York Counties.

(Ex. VI, attached to complaint.)

⁶ The "gun" did not just consist of the Attorney General's directive effectively outlawing portions of the 1972 reapportionment, thereby throwing orderly primary and general elections of 1974 into disarray. There was also a pending three-judge district court action brought by the NAACP to compel the State to enact new district lines in compliance with the Department of Justice's order. *NAACP v. New York City Board of Elections*, 72 Civ. 1460 (S.D.N.Y.).

low, to comply with Justice Department criteria,⁷ informally discussed over the telephone and in person, that there be three senate and two assembly districts with "substantial nonwhite majorities." Because the assembly district in which the entire *Hasidic* community was located under the 1972 apportionment had a nonwhite population of 61.5 per cent and the Justice Department indicated this was insufficient, Mr. Scolaro "got the feeling," although the number was not specifically referred to, that a 65 per cent nonwhite majority would be approved. Under the 1974 reapportionment plan devised and approved the *Hasidic* community was divided almost in half, placed in Assembly Districts 56 and 57 and Senate Districts 23 and 25. Assembly District 56 as redrawn contains 88.1 per cent nonwhite population, Assembly District 57 contains 65.0 per cent nonwhite population, Senate District 23 contains 71.1 per cent nonwhite population, Senate District 25 contains 34.7 per cent nonwhite population. Interim Report of the Joint Committee on Reapportionment, Albany, New York, May 27, 1974, at A29-A30.⁸ This litigation ensued on June 11, 1974, and a TRO was denied below.

⁷ Section 1 of Laws of New York (1974) Ch. 588 reads as follows:

Section 1. This act shall be known as the "Reapportionment Compliance Act of nineteen hundred seventy-four", and its purposes are to effectuate compliance with the determination of the United States Department of Justice dated April first, nineteen hundred seventy-four, and to comply with sections four and five of the Voting Rights Act of nineteen hundred sixty-five insofar as applicable.

(Footnote omitted.)

⁸ According to the Interim Report of the Joint Committee on Reapportionment, Albany, New York, May 27, 1974, the net result of the 1974 reapportionment was to produce out of the 22 assembly districts involved, five districts having a nonwhite population of over 75 per cent and two additional districts of over 65 per cent. *Id.* at 8. Previously there had been six over 60 per cent nonwhite and one over 50 per cent nonwhite, of which five were represented by nonwhites. *Id.* at 7.

On July 1, 1974, the Attorney General approved the 1974 districting here under attack in a 22-page letter covering the scope of his review; the public awareness and comment, in the absence of public hearings, of the reapportionment issue; the intent and purpose of the Voting Rights Act (said, along with the fifteenth amendment, "to have been primarily to eliminate discrimination against Negroes" but also to protect "Puerto Ricans in New York," pp. 9-10); and consideration of the respective computations of voters by race in certain of the redrawn districts. That consideration, it may be pointed out, involved analysis that of Kings County as a whole 64.9 per cent of the population was white, 24.7 per cent black and 10.4 per cent Puerto Rican, and that the issues raised by the plaintiff-appellants here "are not ones which the Attorney General has authority to determine under the provisions of Section 5 of the Voting Rights Act" (p. 19).

The court below denied plaintiffs' motions for a preliminary injunction and for summary judgment and dismissed the complaint below on July 25, 1974. Appeal was filed and this court heard a motion to expedite the appeal on the first motion day thereafter, August 13, 1974, granted the motion, heard the appeal on August 16, 1974, with extensive and skillful briefs, and a week later, per curiam, affirmed the district court's denial of a preliminary injunction.⁹

⁹ Affirmance ensued because appellants had presented to the district court very little probability of success on the merits and the electoral process was well along. Even though the complaint was filed on June 11, 1974, the first day for signing designating petitions for the primary was June 17 and the last day was July 15. N.Y. Election Law § 149-a (McKieney Supp. 1974). By the time this court heard the case, despite its extraordinary expedition, there were only 25 days to the primary. Laws of New York (1974) Ch. 9.

CONTENTIONS OF THE PARTIES

Plaintiffs' complaint sought in addition to a general prayer (1) injunctive relief against the administration and implementation of the 1974 redistricting laws by the defendant Governor and other state officials and New York City Board of Elections¹⁰ (the "state appellees"); (2) a judgment against the Attorney General declaring that the standard under which he rejected the 1972 laws was unconstitutional; (3) declaratory and injunctive relief against the 1974 laws; and (4) injunctive relief against implementation of any redistricting other than that of 1972 or alternatively that established by the Judicial Commission appointed by the New York Court of Appeals.¹¹ Plaintiffs as appellants here essentially argue that because the 1974 redistricting was done under a formula drawn on a racial basis, they have been divided between districts so that their voting power is minimized and diluted, and that inherently suspect racial criteria have been used to create invidious restrictions against them both as members of the *Hasidic* community and as white voters. Particular attack is directed toward what appellants characterize as the Department of Justice's "approach" that "the best way to achieve equality for minorities . . . is to elect more black, Puerto

10 The complaint referred to dilution of the plaintiffs' right to vote for the United States Congress but that was dropped in the early stages of the appeal. The fact that the *Hasidic* community is not divided in the congressional district probably explains this. We note that the NAACP urges that this indicates that the real complaint of appellants is *qua Hasidim*, not *qua* white voter.

11 In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), the Court held that New York's apportionment scheme violated the fourteenth amendment owing to the population disparities between districts. In *In re Orans*, 15 N.Y.2d 339, 206 N.E.2d 854, 258 N.Y.S.2d 825 (1965), the New York Court of Appeals construed the New York Constitution and established a Judicial Commission to draw up an apportionment plan which was approved in *In re Orans*, 17 N.Y.2d 197, 216 N.E.2d 311, 269 N.Y.S.2d 97 (1966).

Rican, Indian or Chicano executives and legislators" (Appellants' brief at 22), and that the only way to reach this goal is to maximize, but not waste, minority populations in each electoral district so that a comfortable majority will offset the lower percentage of nonwhites actually voting. The three principal flaws in the Department's "approach" are said to be (1) the assumption that race is the principal determination of choice by voters; (2) the notion that a high percentage of blacks in a district constitutes "undue concentration" and a lower percentage amounts to "substantial diffusion," because by virtue of the nature of a regional election-district system, districts will vary depending on residential patterns; and (3) the assumption that only black or minority-race legislators can represent black or minority-race interests.¹²

The State appellees argue that there is no constitutional prohibition against cutting across city, county or "community" lines and, as Judge Bruchhausen held, that utilization of racial considerations is not unconstitutional when it is overcoming, as here, a racially discriminatory effect, the unlawful 1972 reapportionment.¹³ The Attorney General argues that the court below is without jurisdiction to review his determination under Section 5 of the Voting Rights Act; that the appellants have no standing to seek that review; and that the constitution and Voting Rights Act do not guarantee individuals who represent a religious or ethnic community districts which maintain community unity. Finally, the NAACP argues, first, that appellants lack standing under the Voting Rights Act and because

12 By not discussing these supposed "flaws" we do not imply that we agree with appellants' characterization of the Justice Department's "approach."

13 For reasons that will be seen, we do not quite reach this question, discussed *infra* at C, but it is true, of course, that the 1972 districting was never actually effectuated.

there is no connection between the alleged injury to appellants and the alleged defects in the 1974 lines, and, second, that the 1974 reapportionment laws are constitutional.

OPINION

A. Section 5 of the Voting Rights Act Is Not a Bar Except as to Relief Against the Attorney General.

We deal first with the question whether, as the Attorney General and NAACP contend, Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, bars this suit. We hold that it does not.

Section 5 specifically states that "neither the Attorney General's failure to object [to, *e.g.*, a reapportionment plan] nor a declaratory judgment [of the District Court for the District of Columbia] entered under this section shall bar a subsequent action to enjoin enforcement of" statutes such as are here under attack. Note 4 *supra*. Even though a state is in compliance with the Act (either by Attorney General approval or district court declaratory judgment), "private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." *Allen v. State Board of Elections*, 393 U.S. 544, 549-50 (1969). This is a "traditional suit" even if it raises novel contentions. Jurisdiction lies under 28 U.S.C. §§ 1331, 1343 and 1357 to vindicate claims under the fourteenth and fifteenth amendments. The Voting Rights Act in no way appears to outlaw a citizen's suit to enjoin a districting statute, such as was involved in, *e.g.*, *Wright v. Rockefeller*, 376 U.S. 52 (1964), *Baker v. Carr*, 369 U.S. 186 (1962), *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), whether or not the state of which he is a citizen is under the hopefully benign aegis of the Voting Rights Act.¹⁴

¹⁴ The last sentence of § 5 of the Act, note 4 *supra*, does require that "[a]ny action under this section" shall be determined by a three-judge

The court below does not, however, have jurisdiction to "review" the Attorney General's determination of April 1, 1974, disapproving the 1972 Act, that jurisdiction being vested exclusively in the District Court for the District of Columbia, in a suit apparently only at the instance of the State or a political subdivision,¹⁵ *Allen v. State Board of Elections*, 393 U.S. at 555, 561. In such a suit the appellants might have had the option of intervening by timely motion at the discretion of the district court. See *NAACP v. New York*, 413 U.S. at 364-69. Since no such suit was filed, to the extent that the appellants seek such review, to which their second specific prayer for relief (as well as some of the language of their otherwise most ingenious brief) was addressed, the court below had no power to give it. Since that is the only relief sought against the Attorney General, dismissal of the complaint against him was warranted.¹⁶

court. That reference includes "subsequent actions to enjoin enforcement" brought by an individual as well as an action by "a State or political subdivision" in the United States District Court for the District of Columbia. *Allen v. State Board of Elections*, 393 U.S. at 561-62. Thus insofar as this suit was originally brought under § 5 of the Voting Rights Act, it was required to be heard by a three-judge court; the NAACP suit, note 6 *supra*, was just such a suit. But this suit, as now maintained, is not a suit under the Voting Rights Act but a suit solely under the fourteenth and fifteenth amendments. As such it is governed by the general three-judge court statute, inapplicable here, note 2 *supra*, not § 5. We do not interpret the last sentence of Part I of the Supreme Court's opinion in *NAACP v. New York*, 413 U.S. 345, 352 (1973), to the contrary.

¹⁵ Indeed, a law suit was instituted directly in the District of Columbia District Court by some individual assemblymen from Kings County when New York's Attorney General decided not to sue on behalf of the State to overturn the April 1, 1974, order. This suit was summarily dismissed for lack of standing. *Griffith v. United States*, Civil No. 74-648 (D.D.C. May 3, 1974). This clearly seems proper under *Allen v. State Board of Elections*, 393 U.S. at 561.

¹⁶ Appellants do not urge that a Voting Rights Act determination of the Attorney General is reviewable under the Administrative Procedure Act, probably because they concede it to be "committed to agency dis-

The rest of the case must be treated as involving only relief sought against the State appellees.

B. Standing to Sue State Officials.

A more difficult question is whether appellants have standing either as representing the *Hasidic* community or as white voters to seek relief against the State appellees. We hold that they do not as *Hasidim* but do as white voters.

As representatives of the *Hasidic* community, appellants present a very appealing case. They properly point with pride to their closely knit community as consisting of a "substantially self-sustaining and totally law-abiding" group, which came to the Williamsburgh area as survivors of the Nazi Holocaust, lives scrupulously observant of distinctive religious practices, and—despite their initial skepticism of democracy—participates actively in civic affairs including the electoral process. As a result of the 1974 laws that community, which had been in one state senate and one state assembly district, has been divided in two and its strength as a voting bloc diluted accordingly. But similar claims for community recognition have been rejected in the past. As was said by a three-judge court in respect to divisions of certain Brooklyn communities in *Wells v. Rockefeller*, 281 F. Supp. 821, 825 (S.D.N.Y. 1968), *rev'd on other grounds*, 394 U.S. 542 (1969):

The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all our citizens. For everyone on the wrong side of the line, there may

creation by law." 5 U.S.C. § 701(a)(2). Analogous determinations under § 407 of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, have been held not subject to judicial review. *United States v. Greenwood Municipal Separate School Districts*, 406 F.2d 1086 (5th Cir. 1969).

well be his counterpart on the right side . . . [E]ven Brooklyn's large population will not support twenty community congressmen. Of necessity, there must be lines which divide.

See also Ince v. Rockefeller, 290 F. Supp. 878 (S.D.N.Y. 1968) (claim of black residents of East Elmhurst, Queens County, that their community was divided between two assembly districts with racial motivation dismissed by single judge). There can be no claim to being left together in one district at least absent a showing of discrimination on grounds of race or color against the residents of the "community" operating so as to deprive them of the right to vote, *e.g.*, in municipal elections, *Gomillion v. Lightfoot*, *supra* (state gerrymandering removed 395 or 396 out of 400 Negro voters from City of Tuskegee boundaries) or, perhaps, operating so as purposefully to diminish the effectiveness of their vote through various districting plans. *See Douglas, J.*, dissenting in *Wright v. Rockefeller*, 376 U.S. at 61; *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972) (three-judge court). There are from 20 to 60 clearly-defined communities in Kings County, but only 8.6 senate districts and 21.4 assembly districts. To preserve community political integrity and comply with *Reynolds v. Sims*, 377 U.S. 533 (1964), would therefore be impossible.¹⁷

Here, more to the point, the appellants do not claim that the purpose of the 1974 districting was to dilute or

17 Under N.Y. Const., Art. III §§ 4, 5 (McKinney 1969), "blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants." Applying this "block on the border" requirement, seven new assembly districts in Kings County have a population of exactly 120,768 and the new senate districts vary by only one person. *See* Interim Report of the Joint Legislative Committee on Reapportionment (hereinafter cited as Interim Report), App. K and M.

abridge the *Hasidic* vote. Rather their complaint is that the purpose was to ensure nonwhite majority representation in the districts in question. Their argument that this purpose was unconstitutional is unchanged whether the *Hasidim* were included in one district or two. While it is true that the appellants may be quarrelling with the Attorney General's apparent viewpoint that the Voting Rights Act does not empower him to consider ethnic as opposed to color discriminations in a submission under the Act, a view which we do not necessarily share, it is a far cry from this to say that a state *must* in a reapportionment draw lines so as to preserve ethnic community unity. Any holding otherwise would, it seems to us, make reapportionment an impossible task for any legislature. Whether our decision on this point is cast on the merits or as a matter of standing is probably immaterial. *See also Wood v. Broom*, 287 U.S. 1 (1932).

We turn then to whether appellants have standing to assert their claims *as white voters* that racial considerations cannot be used in drawing district lines in any manner, a claim which is grounded both upon the equal protection clause, *i.e.*, that *white* voters are denied equal protection, and the fifteenth amendment, *i.e.*, that *white* voters' rights are abridged on account of race or color. There is no reason, as we see it, that a white voter may not have standing, just as a nonwhite voter, to allege a denial of equal protection as well as an abridgement of his right to vote on account of race or color, *see* 1 B. Schwartz, *Statutory History of the United States: Civil Rights* (1970) 181-323, 367-428, regardless of the fact that the fourteenth and fifteenth amendments were adopted for the purpose of ensuring equal protection to the black person. While we generally tend to think of white voters as being in the majority because in the country as a whole and in most states they are, it is plain enough that

in a given state or political subdivision they may not be; to the extent that the fourteenth and fifteenth amendments can be construed as extending the rights of *minority* groups, in a given situation that group may of course be white. Thus, previous cases affording standing to black voters making claims of denial of equal protection or denial or abridgement of vote are equally applicable here. *Cf. Gomillion v. Lightfoot*, *supra* (deciding claim on merits); *Wright v. Rockefeller*, *supra* (same). *See also Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972).

The intervenor-appellee NAACP argues that appellants lack standing because there is no connection between their alleged injury, defined by the intervenor as community dispersal, and the alleged constitutional defect in the 1974 districting, that is, consideration of a 65 per cent nonwhite racial criteria.¹⁸ The argument is that it would have been, and there was some evidence that it was, possible to put the entire *Hasidic* community into one assembly district (the 56th) and one senate district (the 25th) and still comply with the supposed 65 per cent requirement. But we read appellants' claim to be broader than simply a claim for community unity. We read them as urging that *as white voters* their vote has been abridged on account of race or color;¹⁹ it is the community division

18 To be sure, some of the witnesses for appellants (Rabbis Friedman and Stauber, Mr. Lefkowitz) testified that keeping the *Hasidim* together in one district, regardless of the district's having a *nonwhite* majority, was their only concern. But we do not limit appellants' skillful counsel by the expressed views of some of his witnesses, nor do we read their testimony quite as unambiguously as does the NAACP.

19 We read their claim thus, even though they dropped their initial complaint as to the congressional district (in which they were left intact as a community). This streamlining of the case may have been out of sympathy for the federal judges who had to wrestle with their contentions—like avoiding "confusion to the jury." But whatever appel-

which may have induced the litigation but it is the allegation of race or rather color consciousness in the districting that is appellants' claim. We believe there is here a logical nexus between the status asserted by appellants *qua* white voters and this claim. See *Plast v. Cohen*, 392 U.S. 83, 102 (1968). Thus we hold they have standing to assert this claim.

C. The Merits of the Controversy.

The appellants' claim is one that has not only intellectual appeal on the surface but also some support in the language—we do not say rhetoric—of cases which have been brought by nonwhite minority groups. *E.g.*, Douglas, *J.*, dissenting and concurring in *Wright v. Rockefeller*, 376 U.S. at 59, 66-67. See also Judge Feinberg's concurrence in the three-judge district court in *Wright v. Rockefeller*, 211 F. Supp. 460, 468 (S.D.N.Y. 1962), affirmed by the Supreme Court, *supra*. The loss of a vote need not be shown, it is argued; the constitutional vice is constituting lines on a racial (or color) basis. We are referred on the one hand by the appellants to the long line of equal protection cases to the effect that race is always and everywhere a "constitutionally suspect classification," *e.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), and on the other hand by appellees and the intervenor to the almost equally long line of cases permitting racial considerations to be used affirmatively to offset past discrimination or as the district court here put it, 377 F. Supp. 1164, 1166, to "correct a wrong"—in education, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); in housing, *Olcro v. New York City Housing Authority*, 484 F.2d 1122, 1132-34 (2d Cir.

lants' motives are, it would be inappropriate—and too easy—for us to drop a real issue in the case on the basis that we believed appellants' interest was *qua* Hasidim, not *qua* whites.

1973); in grand jury selection, *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967); and in employment, *Associated General Contractors v. Altshuler*, 490 F.2d 9, 16-19 (1st Cir. 1973), *cert. denied*, 42 U.S.L.W. 3594 (1974). However tempting it might be in the abstract to determine whether gerrymandering with race or color in mind may be affirmatively used to offset previous race or color discrimination, that question, analogous perhaps to the question that was argued if not decided in *DeFunis v. Odegaard*, 42 U.S.L.W. 4578 (U.S. Apr. 23, 1974), we do not think is reached here.

In the first place, there is no showing here that the effect of the New York legislature's drawing the 1974 district lines as it did was invidiously to cancel out or minimize the voting strength of white voters in Kings County. Even considering that the assembly and senate districts here in question would now necessarily elect nonwhite assemblymen and senators, an assumption we by no means may make,²⁰ there would be no disproportionately nonwhite representation in either house.²¹ Even if there were, that would apparently

20 Substantial nonwhite majorities did not result in election of nonwhites in all cases in, *e.g.*, the 1972 election. Thankfully, we seem more and more coming to the day when the American voters vote *person or party or issue* and not *color or race or sex*. Until that idyllic day all voters do this, however, a Voting Rights Act or fifteenth amendment will be necessary.

21 The population of Kings County is 64.9 per cent white, 24.7 per cent black and 10.4 per cent Puerto Rican. Memorandum of Decision, United States Dep't of Justice, Nos. V6541-47, July 1, 1974, at 13. For purposes of the Voting Rights Act the Puerto Rican population is considered nonwhite. *Id.* at 10-11. Thus Kings County is 35.1 per cent nonwhite. Under the 1972 districting, one out of the ten senate districts contained a substantial nonwhite majority population. Under the amended 1974 plan three of the districts, or 30 per cent, contain substantial nonwhite population majorities—proportionately slightly less minority concentration districts than the percentage of nonwhite voters in the county. Interim Report of the Joint Committee on Reapportionment, *supra* note 8, at 5. Of the 22 assembly districts in Kings County

be insufficient to sustain appellants' claim under the stiffer test of *White v. Regester*, 412 U.S. 755 (1973) (Texas multi-member districts dissolved), and *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971); the burden, *White* says, 412 U.S. at 766, is

to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Here there is no such evidence: there is no history of official racial discrimination against whites; there is no indication that the white community has ever in fact been the victim of political or other racial discrimination in the districts in question, in Kings County, or in the state of New York as a whole.²²

Thus, appellants' argument is reduced to the proposition that districting on racial lines is per se unconstitutional.

six had over 60 per cent nonwhite population and one over 50 per cent nonwhite population under the 1972 plan. The 1974 plan created five districts having over 75 per cent nonwhite population and two of over 65 per cent. Thus seven or 31.4 per cent of the districts contain a majority of nonwhite population, again less than the percentage of the nonwhite population in the county. *Id.* at 7-8.

- 22 In *Wright v. Rockefeller*, 376 U.S. at 58, the Court, holding that proof of discrimination by race was essential to plaintiffs' challenge of a New York apportionment statute, said:

We accept the District Court's finding that appellants have not shown that the challenged part of the New York Act was the product of a state contrivance to segregate on the basis of race or place of origin.

(Emphasis added.) Here there is no allegation of a contrivance to segregate.

In deciding this question it is unnecessary to determine whether a legislature, starting afresh, can draw lines on a racial or color basis so as to give proportional representation or equivalent voting strength to whites and nonwhites. This is true even though some authority can be found supporting both sides of such a proposition.²³

Happily, perhaps, our task is a narrower one than determining the applicability of the *Gaffney* principle, see

- 23 *Reynolds v. Sims*, 377 U.S. 533, 579-81 (1964), recognizes that there are considerations such as political boundaries which can be taken into account. See Note, *Reapportionment*, 79 Harv. L. Rev. 1226, 1244-46 (1966). The issue would be whether race can be considered nonindividually. See also *Mahan v. Howell*, 410 U.S. 315, 325 (1973) (Virginia legislature can deviate slightly from equal population to maintain integrity of political subdivisions so long as the deviation is "free from any taint of arbitrariness or discrimination"). *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973), contains some pertinent language. "There are other relevant factors [than mathematical equality among district populations] to be taken into account and other important interests that States may legitimately be mindful of." In *Gaffney* the Court held that a

consciously and overtly adopted and followed . . . policy of "political fairness," which aimed at a rough scheme of proportional representation of the two major political parties

was constitutional. *Id.* at 738. While the Court said that districting is invalid if it "fences out a racial group" (*Gomillion v. Lightfoot*, *supra* note 2) and multimember districting is invalid if it "enables out the voting strength of racial or political elements" (*Portson v. Dorsey*, 379 U.S. 433 (1965), *id.* at 751, it also said that "[d]istrict lines are rarely neutral phenomena," and that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results," *id.* at 753. The Court then said at the time a "neutral" plan is known, its political effect is known and when the plan is passed its effect is therefore "intended." *Id.* The same can obviously be said of racial considerations. The *Gaffney* Court held that as long as groups, political and racial, are not "fenced out" and their voting strength "invidiously minimized" (*White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971)), and as long as population is equal, political considerations are valid.

But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and,

note 23 *supra*, in a racial districting case. Here the New York legislature was not "starting afresh"; the State had run afoul of the Voting Rights Act. Thus it was drawing district lines in conformity with standards of the Attorney General of the United States, acting under that Act in a way not subject to challenge here for reasons previously stated. We, therefore, need do no more than rely on *Allen v. Board of Elections*, 393 U.S. at 569, where the Court referred to the companion case heard under the *Allen* name, *Fairley v. Patterson*, which involved a change from district to at-large voting for county supervisors. The Court said:

through districting, provide a rough sort of proportional representation in the legislative halls of the State.

Id. at 754 (emphasis added).

Since the Court lumps "political and racial" together in its analysis, it could be argued that the same holding applies where a state districting, for whatever reason, gives racial minorities, as here, proportional strength. Indeed, "colorblindness" could in a given situation lead to unfair results. See Note, *Reapportionment on the Sub-State Level of Government: Equal Representation or Equal Vote?*, 50 D.U.L. Rev. 231, 252 (1970):

Strict numerical equality is one constitutional standard, and a plan providing for numerical equality would never be constitutionally abhorrent unless it was proven that the plan was purposely adopted to shut out a specific minority [citing *Fortson v. Dorsey*, 379 U.S. 433 (1965)].

But see *Whitcomb v. Chavis*, 403 U.S. at 149-60; *Howard v. Adams County Board of Supervisors*, 453 F.2d 455 (5th Cir. 1972); *Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Tex. 1966) (three-judge court), *rev'd on other grounds*, 386 U.S. 120 (1967); *Mann v. Davis*, 245 F. Supp. 241, 245 (E.D. Va.) (three-judge court), *aff'd*, 382 U.S. 42 (1965); *Ferrell v. Oklahoma*, 339 F. Supp. 73, 83 (W.D. Okla.) (three-judge court), *aff'd*, 406 U.S. 939 (1972). And see Douglas, J., dissenting in *Wright v. Rockefeller*, 376 U.S. at 66-67:

But government has no business designing electoral districts along racial or religious lines. We held in *Akins v. Texas*, 325 U.S. 398, 403 and in *Brown v. Allen*, 344 U.S. 443, 471, that courts in selecting juries need not—indeed should not—give each jury list the proportional racial composition that the community has. If race is not a proper criterion for drawing a jury list, how can it be in designing an electoral district?

The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

This type of situation, underrepresentation of race by the districting of 1972 following upon dilution of nonwhite representation through the use of unlawful devices in and prior to 1968, is what *Allen* held the Voting Rights Act was designed to cure. To correct an invidious discrimination in favor of white voters and against nonwhites which had occurred in Kings County, the Attorney General necessarily had to think in racial terms in considering his approval of the 1974 lines. To the extent that approval was sought in advance, and the lines drawn by the legislature so as to obtain the Attorney General's favorable nod, it might be said that the racial result was "intended." Cf. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). But this is what the Voting Rights Act contemplated, and since it necessarily deals with race or color, corrective action under it must do the same.²⁴ That the Act was intended to implement the fourteenth and fifteenth amendments and is constitutional, there can be no doubt. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

We hold, therefore, that so long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the

²⁴ It is probably redundant to reiterate that the appellants cannot obtain review of the Attorney General's action here. See *A supra*.

Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or non-white, that districting is not subject to challenge. Whether this is to say that in the broader sense the controversy is not "justiciable" (which would bring us full circle in this situation to *Colgrove v. Green*, 328 U.S. 549 (1946),²⁵ or that the appellants' claim lacks merit, we can leave to someone else to determine. Our judgment is that the judgment dismissing the complaint is affirmed. If the appellants have any solace as white voters it is that the application of the Voting Rights Act to New York is limited to a ten year period, as we have pointed out. Section 4(a), 42 U.S.C. § 1973b(a).

Judgment affirmed.

FRANKEL, *District Judge* (dissenting):

Agreeing that the action is not barred by the Voting Rights Act and that plaintiffs have standing, I would reverse and hold the laws in question unconstitutional.

As perceived by the majority, the bland contention emerging from this "recipe for judicial perplexity" is whether "districting on racial lines is per se unconstitutional." If that is the question, the dissent now launched is largely beside the point. With deference, however, I believe the court has misplaced the perplexities actually presented by overlooking the critical (and undisputed) facts.

The case is not about whether an awareness of race in drawing district lines is "per se unconstitutional." The case concerns the drawing of district lines with a central and governing premise that a set number of districts must

²⁵ That is, that determining where district lines should be drawn is a legislative rather than a judicial function. The judiciary's only role is assuring that the determination is not invidious in purpose or effect.

have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts. The case is one where no preexisting wrong was shown of such a character as to justify, or render congruent, a presumptively odious concept of a racial "critical mass" as a principle for the fashioning of electoral districts. Indeed, it is a case where no official is willing to accept, let alone to claim, responsibility for the requirement of 65% or over nonwhite. This is the case that compels me to vote for reversal.

I.

Critical facts, though discoverable from the court's opinion, must be highlighted to make the points in this dissent.

When the United States Attorney General reviewed the State's 1972 districting laws, he found them acceptable for the most part. As to "parts of the plans in Kings and New York Counties," however, he found that the State had not met its "burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color. . . ." He "concluded that the proscribed effect may exist" in the unapproved parts of the plans. With respect to the Kings County Senate and Assembly plans, which concern us here, he said:

" . . . Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist."

Neither the Legislature nor the Executive of New York agreed with this appraisal of their legislation. But the pressures of time posed hard choices. June 17 was the first day for signing designating petitions for the primary. N.Y. Election Law §149-a, subd.2. The petitions were to be filed with the Board of Elections by July 15. *Id.*, subd. 4. The primary was scheduled for September 10. Laws of 1974, ch. 9.

In the face of this schedule, it was determined that the lines should be redrawn in a fashion that might obviate the Attorney General's objections. The initial work of meeting the objections was undertaken by the Joint Legislative Committee on Reapportionment. Working with the Department of Justice, the Committee's staff acquired the understanding that they must organize two more Senate and two more Assembly districts with substantial nonwhite majorities.

So far as can be told from the record before us, there was no semblance of an effort to take the asserted instances of undue "concentration" and improper "diffusion" and set them to rights by particular and principled revisions. Instead, in an atmosphere of hasty dickering, the Legislative Committee staff proceeded to redraw the lines under a controlling mandate to see that seven Assembly and three Senate districts had nonwhite majorities of 65% or greater. The 65% figure was taken on the explicit premise that anything less (given lower rates of voter registration and turnout) would render uncertain the power of the nonwhite majority to control election results in those districts. The 65% minimum was pressed in total disregard of whether it might be a necessary or suitable means to correct any improper "concentration" or "diffusion."

While it was never said explicitly (a matter of some consequence for the decision herein), the Committee's

staff director "got the feeling" that, to avoid disapproval, the 1972 Assembly district in which the *Hasidic* community was entirely embraced at the time would require revision to raise its nonwhite population from 61.5% to 65%. As he described the exchanges with Department of Justice personnel, the upward revision from 61.5% resulted from conversations and inferences of the following character:

"I said how much higher do you have to go?

"Is 70 percent all right?

"They didn't say yes or no, but they indicated it is more in line with the way we think in order to effect the possibility of a minority candidate being elected within that district.

"I suggested 65 percent. It came out at that time that is a figure used by the NAACP in numerous briefs and other documents.

"I got the feeling, and I cannot vouch for this as a matter of having been specifically said, but I left that meeting indicating that 65 percent would be probably an approved figure."

The upshot of the talks, the director said, was: "I thought it was logical for me to assume anything under 65 would not be acceptable."

Following the "feelings" and assumptions thus derived, the Joint Committee made the district line changes assailed in this case; "block by block and census tract by census tract, [they] colored in in various proportions the Puerto Rican population, and the black population, all over the area." The former district lines were thus revised by adding blocks or sections here and there, subtracting and shifting others, all with an eye single upon the racial composition of the bits and pieces being moved. The criteria that had been followed in the 1972 enact-

ments—the interests, for example, in communities and natural boundaries—were not directly altered, but were subordinated where necessary to the central objective of racial shifts to achieve seemingly required percentages. Bills embodying these changes were introduced in a special session of the New York State Legislature and enacted on May 29 and 30, 1974. Laws of 1974, chs. 588, 589, 590, 591, and 599. There does not appear to have been any revision by the Legislature of the work, or of the underlying premises, of the Joint Committee.

The new laws were submitted for the Attorney General's approval on May 31, 1974, and declared unobjectionable by him on July 1, 1974. The phrasing of his response is interesting and significant. He said he "does not interpose any objection. . . ." He took pains to spell out at length his disclaimer of responsibility, or even support, for the 65% idea or any other semblance of a racial quota or minimum supposed necessary for effective control.

Far from seeking to justify the racially determined changes of 1974 as essential or proper remedies for anything, the Attorney General assures us that "nothing supports the proposition that the plan upon which the State decided was at the insistence of the United States."¹ That statement in a brief merely reaffirms what was said at greater length when the Department of Justice announced its non-objection to the 1974 redistricting:

"In assessing these arguments [against the 1974 lines], two basic principles should be kept in mind. First, it is not the function or authority of the Attorney General under Section 5 to devise redistricting plans, or for that matter to dictate to the State of New York specific actions, steps or lines with respect

¹ Brief for Appellee Saxbe, p. 22.

to its own redistricting plan. The only function of the Attorney General under Section 5 is to evaluate a voting change, such as that encompassed in the instant submission, once it has been adopted by the state and submitted for the Attorney General's review, and to determine the limited question of whether the purpose or effect of the change in question is to deny or abridge the right to vote on account of race or color. If no such abridgment or denial exists, the Attorney General must not object to the plan, regardless of the merits or demerits of the plan in other regards, including state, local, and partisan political ones. If an abridgment or denial does exist—as we found in the first submission by New York—the Attorney General must object, stating his reasons, but not drawing a counter plan or commanding any particular state response."²

Not only did the Attorney General pointedly disavow the "function . . . to devise redistricting plans"; he made plain in the same decision his position that concern for the rights of white voters (except perhaps for those with Spanish surnames) was actually no part of his business under the Voting Rights Act. The Civil Rights Division, speaking for him, said:

"In contrast to the foregoing conclusion regarding Puerto Ricans [that some Spanish-surnamed Americans are covered by federal statutes which protect the rights of non-white citizens], there was nothing revealed by our review of the circumstances surrounding the adoption of the Fifteenth Amendment, the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political sub-

² Department of Justice, Civil Rights Division, Memorandum of Decision, July 1, 1974, p. 17.

divisions under the Act which indicates that Hasidic Jews or persons of Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act. Nor has material supporting that view been brought to our attention by others. We are forced to conclude, therefore, that given what we now know of relevant precedent, these groups are not among those whose rights the Attorney General is commanded and empowered to protect in his consideration of a submission under Section 5 of the Voting Rights Act. We make no comment, of course, on the relative merits of this congressionally defined scope of coverage and nothing we say here should be interpreted as affecting any other rights accruing to these parties from other sources."²

Thus, the problem presented here is one the Attorney General did not even consider. Correctly or not, he deemed it beyond the bounds of his concern to notice whether the rights of white voters might suffer invasion by the districting plans he was asked to review.

II.

The law governing this case begins with the fundamental proposition that classification by race or ethnic origin is "odious" in our society, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), to be tolerated, if at all, only for rare and compelling necessities, see *Korematsu v. United States*, 323 U.S. 214 (1944), and perhaps nowhere more repulsive than in relation to the "right to vote freely . . . [which] is of the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The complexities of life have been thought to compel occasional departures, slight always and gingerly, from the rule of governmental color-blind-

² *Id.* pp. 11-12.

ness. But the idea of quotas, deeply suspect anywhere, is likely never to find root, while we preserve our fundamental character as a nation, in the organization of electoral constituencies. The idea of a polity, deliberately organized as a matter of state policy, into districts whose people are proportioned according to whether they are white, black, yellow—and, let us not blink, "Hungarians . . . , Poles . . . , Germans . . . , Portuguese . . . , Mexicans [or] the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities", *Hughes v. Superior Court*, 339 U.S. 460, 464 (1950)—is at war with our bedrock concepts of individual worth and integrity. But that is essentially the concept followed in drawing the districts involved in this case.⁴

The racial quota or 65% minimum employed for districting in this case was held valid in the district court "to correct a wrong" and is sustained again here as "cor-

⁴ Among the dubieties in this case is the insistent concern for "non-white" majorities that embrace both blacks and Puerto Ricans. Whatever inspires the United States Attorney General, a court sitting in New York may notice the artificiality of the merger. It may be true that in our rich, and sometimes bitter, diversities, sundry whites, of various stripes, are frequently at odds with Puerto Ricans. But conflicts between blacks and Puerto Ricans are familiar. See Gaby, "Newark: The Promise of Survival," *The Nation*, December 14, 1974, at 619, 621. The latter have been heard in the context of this very case to resist being submerged by black majorities or pluralities to make "nonwhite" majorities; they seek instead a Bronx Congressional district in which Puerto Ricans are a majority. "Puerto Rican spokesmen," it was noted by the Department of Justice, complained of one Congressional district containing 53% blacks, 19.2% Puerto Ricans, and a combined "non-white majority" of 72.2%. Civil Rights Division, Memorandum of Decision, July 1, 1974, p. 14. Likewise, they assailed another district which had 45.1% black, 18.2% Puerto Rican and a resulting "nonwhite majority" of 63.3%. "They maintain[ed] that the plan [had] the effect of splintering off substantial numbers of Puerto Ricans into [the 2 districts] and that a district could be created in which Puerto Ricans are a majority." *Id.* If these are not cheerful subjects, they do remind us of the thorns, political as well as constitutional, into which we plunge when we consider racial quotas for voting districts.

rective action." There are two defects in this position, each independently sufficient to require reversal:

- (1) The attack is upon legislation, but neither the legislature nor any responsible official anywhere purports to have found the racial quota either necessary or even appropriate to correct the supposed wrongs.
- (2) Whatever an official could have said, the record before us reveals not even a reasonable basis, let alone a compelling necessity, to justify a scheme of nonwhite control (and white subordination) through a predetermined minimum of 65% per selected district.

(1) Neither the district court nor this court has "found" the 65% rule suited as a remedy for the unsurmounted objections of the Attorney General to the 1972 lines. Nobody else has made such a finding either. But "corrective action," surely not least when it takes the form of racial criteria for legislation, must be related to the evil or disorder to be cured; "the means chosen to implement the compelling interest should be reasonably related to the desired end." *Associated General Contractors v. Altshuler*, 490 F.2d 9, 18 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); cf. *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973); *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964); *Brooks v. Beto*, 366 F.2d 1, 12 (5th Cir. 1966); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 390 (5th Cir.), cert. denied *sub nom. Caddo Parish School Bd. v. United States*, 389 U.S. 840 (1967).

Far from finding or claiming such a remedial function for the questioned district lines, the authors of the legislation earnestly deny the need for it. The State, as its brief reminds us (p. 3), drew the 1974 lines only "[t]o satisfy

the demands of the United States Attorney General. . . ." It did this, the same brief stresses (p. 15), though it "does not believe that the 1972 legislative . . . redistricting statutes produced a racially discriminatory effect as charged by the Department of Justice. . . ."

As for the Department of Justice, it did, of course, rule as an antecedent of the 1974 redistricting that the State had not met its "burden of proving that the submitted [1972] plans have neither the purpose nor the effect of abridging the right to vote because of race or color."⁵ We need not conjure at this time with the question of how far this "failure of proof" may be deemed, in the words of the Intervenor (N.A.A.C.P. and others), a "decision that the 1972 lines were discriminatory."⁶ Treating it as such, the critical point remains that the Attorney General of the United States utterly disclaims approval, let alone authority, of the 65% mandate.

Thus, the majority errs, I think, when it says the State Legislature "was drawing district lines in conformity with standards of the Attorney General of the United States. . . ."

In this setting, where nobody professes to have determined that the quota requirement was necessary or proper as a remedy for supposed wrongs, it is erroneous for this or any court to validate the arrangement as "corrective action." This would be so even if, contrary to the view tendered later in this opinion, such a species of remedy might somehow survive constitutional scrutiny. It is clearly true where no one purports to have fashioned the remedy to repair, aptly and carefully, the supposed evil it addressed.

⁵ Letter dated April 1, 1974, from Assistant Attorney General J. Stanley Pottinger to George D. Zuckerman, Assistant Attorney General, State of New York, at 1.

⁶ Brief for Intervenor-Appellees, N.A.A.C.P. et al., p. 4.

It is not the court's proper business to decide whether we might, as New York legislators, have found persuasive a course of reasoning repudiated by those elected to write the laws of New York. The repudiation is decisive for us. It is at least decisive where no other authority (specifically, the United States Attorney General) with a voice in the matter sustains the "corrective action" premise. Strictly and narrowly speaking, which may be the best way to speak for most constitutional law matters, we are neither required nor entitled to determine whether the 1974 districting laws might be sustainable upon a foundation the Legislature did not purport even to consider.

Where vital constitutional rights are at stake, asserted statutory invasions are not justifiable by supposed legislative purposes that are not reasonably discoverable from what the legislature has done. *Eisenstadt v. Baird*, 405 U.S. 438, 447-52 (1972). A purpose never considered and adopted by the authoritative organs of the state's power cannot supply a "rational basis" (or, of course, any meaningful basis at all) for a state enactment. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); see also *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960); cf. *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940). *A fortiori*, a ground deliberately rejected by the State Legislature cannot sustain a law which, but for that ground, violates the fourteenth and fifteenth amendments.

That is the instant case. There is no authoritative claim that the racial 65% minimum majority applied to create the disputed districts could be justified by compelling need. There is not even an assertion by any responsible official of a rational basis. Because this is so, we should probably end this case by striking down the laws and "remanding" to the New York Legislature for focused, rational, lawful drawing of district lines. Cf. *United States*

v. Bass, 404 U.S. 336, 349-50 (1971); Bickel & Wellington, *Legislative Purpose and the Judicial Process*, 71 Harv. L. Rev. 1 (1957).

(2) Beyond the things the State Legislature and the United States Attorney General have said and left unsaid, the record before us presents no ground for sustaining the *a priori* judgment that some districts must have at least a 65% nonwhite majority where the county is 35.1% nonwhite and the State 13% nonwhite. I say this on "the record before us" to leave room for some conceivable record where a predetermined racial quota might be found constitutional. One may doubt profoundly that there will ever be such a case. Suffice it to say for now that the case before us is not it.

As reflected in the precedents reviewed by Judge Oakes, there is great constitutional force in the premise that the "[f]ramers of voting districts are required to be color blind." *Ince v. Rockefeller*, 290 F.Supp. 878, 884 (S.D.N.Y. 1968). See, e.g., *White v. Regester*, 412 U.S. 755, 765-70 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-60 (1971); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). What should be still clearer is that the fourteenth and fifteenth amendments forbid the fashioning of electoral districts "so as to make the voice of one racial group weak or strong, as the case may be." *Whitcomb v. Chavis*, 403 U.S. 124, 176-77 (1971) (Douglas, J., concurring and dissenting).

Racial or credal "proportional representation" offends against the most fundamental tenets of our constitutional scheme. *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Akins v. Texas*, 325 U.S. 398, 403 (1945); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). Once we start racial—or religious or ethnic—quotas for voting purposes, we forsake the anchor of governmental neutrality that has kept us secure despite

the sometimes raging storms of group conflict we have had to weather. Polyglot and unmelted as we are, we have been blessed with recurrent demonstrations of our ability to erase racial stigmatization as the sole test for selecting leaders and conferring power. We disgraced ourselves on the subject before we tardily elected a Catholic President. Our most tragic dilemma has been, certainly, the persecution of nonwhite people, and the degrading aspects of that are far from ended. But there is hope in the evidence of improvement. If there is any religious majority, one need not belong to it to be elected. As for skin color, appellants' papers call to our attention that 13 of our cities with populations exceeding 50,000 have nonwhite mayors although seven of those cities have white majorities and only two have nonwhite majorities exceeding 65%. Notable among the omissions from this compilation is Los Angeles, which, with a population approximately 18% black, has had a black mayor since 1973.⁷

"Racial electoral registers [dividing electoral districts along racial lines like the racial and religious lines known historically or currently in India, Lebanon, and elsewhere], like religious ones, have no place in a society that honors the Lincoln tradition--'of the people, by the people, for the people.' Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic and so on. Cf. *Gray v. Sanders*, 372 U.S. 368, 379. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is

⁷ See N.Y. Times, No. 27, 1974, p. 1, col. 1.

a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines."

Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) (footnote omitted).

The mixed story of racial troubles and conflicts is a long one. But our concern is not with sociology or politics or history as such. It should be enough for us that fixed principles of constitutional law normally bar classifications by race and that we have been shown nothing whatsoever to justify the use of a 65% minimum majority for any race in any district as an advance prescription for districting.

The flaws in today's decision, as I see them, may become more clearly visible if we (a) consider generally how valid districting *should* proceed and (b) note some of the arguments offered as justifications for today's result in the opinion of the court. To begin at the beginning, before problems of alleged illegality may appear, lawfully drawn state legislative districts presumably reflect some agreed assumptions, though the nature of these assumptions may not yet be a matter of absolute clarity. See *Cousins v. City Council of City of Chicago*, 503 F.2d 912, 917, 919 (7th Cir. 1974) ("legitimate or nonjusticiable concerns" may sustain districting decisions). It may be supposed that the lines ought to follow reasonably straight paths, swerving for geographic or community or political subdivision boundaries where necessary or rational, see *Mahan v. Howell*, 410 U.S. 315, 325 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 742 (1973), embracing substantially equal numbers of peo-

ple, and forming perimeters as simple, regular, and "couth," cf. *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960), as good faith and neutrality will allow. Most fundamentally for this case, the drawers of the lines must not be encapsulating or fencing out people of particular races or religions or ancestries, whether to maximize or minimize the strength of any racial or religious or ethnic groups.

If people have been forced in or out because of race, then, of course, the fences must be torn down and the districts in this manner redrawn lawfully. That is, the forbidden use of race must be overcome by some condign remedy. But what is the nature of the pre-existing wrong that could make it condign or permissible to set up a minimum quota of 65% or any percentage for one race or group of races? This record and the majority opinion will be searched in vain for an answer to this question.

Let us consider Kings County, the focus of our concern, and try to fathom better what is involved. The nonwhite population of the County is 35.1%. Were the nonwhite people spread evenly through the County, orderly and symmetrical districts could well include none with a nonwhite majority. Cf. *Cousins v. City Council of City of Chicago*, 503 F.2d 912, 921 (7th Cir. 1974).

Add another reality—that racial distribution is not even through the County. The *a priori* 65% figure could not serve, except by some wild accident not suggested to have happened in this case, to reflect the racial distribution in any fair, rational, racially neutral sense. Instead, it would ensure (as it did in this case) that an arbitrarily prescribed number of legislative districts must be gerrymandered to meet the prescription. It is, of course, conceivable that some particular district or districts, fairly and lawfully drawn, could come out with a population 65% (or any percent) nonwhite. But there is no faint suggestion that

this is what happened here. There is no rational explanation of any kind for the 65% figure in *any* district because the figure was taken in advance, as a racial quota, rather than resulting from fair apportionment on constitutionally permissible principles. Cf. *Compensatory Racial Reapportionment*, 25 Stanford L. Rev. 84, 99-100 (1972).

(b) The majority sees in this record "no showing . . . that the effect of the New York legislature's drawing the 1974 district lines as it did was invidiously to cancel out or minimize the voting strength of white voters in Kings County." Whatever may be true of "Kings County" as a whole, there is precisely an impermissible cancellation or minimization if the massing of 65% or greater nonwhite majorities in the districts that concern us cannot be squared with the Constitution.

The majority goes on to say:

"Even considering that the assembly and senate districts here in question would now necessarily elect nonwhite assemblymen and senators, an assumption we by no means may make, there would be no disproportionately nonwhite representation in either house." (Footnotes omitted.)

Like the majority, I am prepared to repudiate the assumption. But the statement by the majority of why it makes no difference seems to me to extend the line of fallacious reasoning. What does it mean, *for purposes of constitutional law*, to speak of "disproportionately nonwhite representation"? Is that supposed evil suffered by Massachusetts, whose nonwhite Senator is returned by an electorate less than three percent nonwhite? The point, if only in passing, is that our Constitution forbids us to reason from notions about what kind of racial composition is "proportionate" or "disproportionate" in our legislatures.

The clear statement of the majority's different view comes in its footnote to the sentence last quoted. We are told there:

"The population of Kings County is 64.9 per cent white, 24.7 per cent black and 10.4 per cent Puerto Rican. Memorandum of Decision, United States Dep't of Justice, Nos. V6541-47, July 1, 1974, at 13.

For purposes of the Voting Rights Act the Puerto Rican population is considered nonwhite. [But see note 4, *supra*.] *Id.* at 10-11. Thus Kings County is 35.1 per cent nonwhite. Under the 1972 districting, one out of the ten senate districts contained a substantial nonwhite majority population. Under the amended 1974 plan three of the districts, or 30 per cent, contain substantial nonwhite population majorities—proportionately slightly less minority concentration districts than the percentage of nonwhite voters in the county. Interim Report of The Joint Committee on Reapportionment, *supra*, note 8, at 5. Of the 22 assembly districts in Kings County six had over 60 per cent nonwhite population and one over 50 per cent nonwhite population under the 1972 plan. The 1974 plan created five districts having over 75 per cent nonwhite population and two of over 65 per cent. Thus seven or 31.4 per cent of the districts contain a majority of nonwhite population, again less than the percentage of the nonwhite population in the county. *Id.* at 7-8.

Here, if with unflagging deference, I find gaps in sheer logic as well as unacceptable constitutional doctrine. As I have mentioned earlier, a *minority* of any kind in a county need not be a majority in any district at all. See *Census v. City Council of City of Chicago*, 406 F.2d 830, 842-43 (7th Cir.), *cert. denied*, 409 U.S. 892 (1972). There is no ground

in logic or law for translating the percentage relationship of a minority to the whole county population into a *percentage of districts* over which that minority should have majority control, let alone majority control by some prescribed "effective" margin.

There are unbearable and absurd implications in the notion of "proportionality" between racial or ethnic *population* percentages and percentages of *districts* controlled by different racial or ethnic groups. Beyond the limited skin-color divisions, some 65% white and 35% "nonwhite," Kings County has 10.7% Italian immigrants or people with at least one parent who immigrated from Italy, some unknown additional percentage of Italian ancestry, a similar figure of 5.9% plus unknown additional Russian, 35% Roman Catholic, 4.7% recently immigrated Polish, 32.5% Protestant, 10.4% Puerto Rican, 1.7% recently from Austria, 1.7% recently from Ireland (plus many more of Irish ancestry), 30.3% Jewish, 2.2% "other" religions, 1.3% recent German immigrants, plus a dizzying mass of others "whose lineage is so diverse as to defy ethnic labels." *De Funis v. Odegaard*, 416 U.S. 312, 332 (1974) (Douglas, J., dissenting).⁸ How do we figure out the percentage of districts to be controlled by German Catholics, Russian Jews, black as against white Protestants, etc.? The short answer is, of course, that we don't. But the apparent "test" in today's majority opinion (31.4% nonwhite districts a "good" figure because less than the 35.1% nonwhite Kings County population) implies that perhaps we should. If that is not the implication, the point of the majority's footnote 21 is not discernible. If that is the implication,

⁸ The figures cited are mostly from the 1970 U.S. Census. See also Council of Churches of the City of New York, "Protestant and Orthodox Church Directory," (1972), p. 81. The exact figures are, in any event, of no consequence. The point is, of course, the unsupportable welter of multifarious minorities.

it is a matter specially and particularly opposed in this dissent.

This is, in sum, a case of racial quotas that are evil and dangerous because there is no semblance of justification for them. I would, therefore, reverse and hold the laws in question unconstitutional.

APPENDIX G

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

United States Courthouse
Foley Square

A. Daniel Fusaro New York 10007
Clerk

SEPTEMBER TERM 1973

United Jewish Organization v. Wilson
Docket No. 74-2037 Decided January 6, 1975

In Judge Oakes' opinion in the above-entitled case the following changes have been made:

Page 5973, line 5 — delete "Decided January 6, 1974" and insert "Decided January 6, 1975" in place thereof.

Page 5979, line 8 — delete the "period" after "case" and insert a "comma" in place thereof.

Page 5979, line 9 — delete "(1973). But after" and insert "(1973), but on remand its motion was granted. After" in place thereof.

Page 5979, line 13 — delete "Justice Department" and insert "intervenor NAACP" in place thereof.

Page 5979, lines 18 and 19 — delete "denying the State's motion" and insert "granting the NAACP's motion" in place thereof.

Page 5985, footnote 13 — delete entirely and insert "Although the outcome of this litigation does not turn on whether the 1972 districting was ever effectuated, its lines were used in the 1972

primary and general elections. Thereafter the District of Columbia District Court found that the counties in question were not exempt from the Voting Rights Act." in place thereof.

Page 5993, footnote 20 — delete "Substantial nonwhite majorities did not result in election of nonwhites in all cases in, *e.g.*, the 1972 election."

Page 5995, footnote 23, 15 lines up from bottom — delete "(1965)," and insert "(1965))," in place thereof.

Page 5998, line 7 — delete "(1946)," and insert "(1946))," in place thereof.

In Judge Frankel's dissenting opinion in the above-entitled case the following changes have been made:

Page 6006, line 3 — delete "legislation" and insert "legislation" in place thereof.

Page 6010, footnote 7 — delete "No. 27" and insert "Nov. 27" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hd

APPENDIX H

**UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., et al.,
Plaintiffs,**

v.

**Malcolm WILSON, Governor of The State
of New York, et al., Defendants.**

No. 74 C 877.

United States District Court,
E.D. New York.
July 25, 1974.

Suit was instituted to declare redistricted lines of state senatorial, state assembly and United States congressional districts in county unconstitutional. The District Court, Bruchhausen, J., held that action brought pursuant to Voting Rights Act was required to be dismissed, where office of Attorney General of United States had approved redistricted lines; and that objection of plaintiffs, members of Hasidic community in city, to division into separate senatorial and assemblanic districts by state, statutes establishing redistricting lines did not disclose violation of rights under Fourteenth and Fifteenth Amendments, where no one was being disenfranchised by redistricting and no voting right was being extinguished.

Judgment accordingly.

Judgment affirmed, 2 Cir., 500 F. 2d 434.

1. States — 27(10)

United States — 10

Action, brought pursuant to Voting Rights Act, challenging validity of redistricted lines of state senatorial, state assembly and United States congressional districts in county was required to be dismissed, where office of Attorney General of United States had approved redistricted lines. Laws N.Y. 1974, cc. 588-591, 599; 42 U.S.C.A. § 1971 et seq.; Voting Rights Act Amendments of 1970, § 5, 42 U.S.C.A. § 1973c.

2. States — 27(3)

Objection of plaintiffs, members of Hasidic community in city, to division into separate senatorial and assemblanic districts by state statutes establishing redistricted lines did not disclose violation of rights under Fourteenth and Fifteenth Amendments, where no one was being disenfranchised by redistricting and no voting right was being extinguished. Laws N.Y. 1974, cc. 588-591, 599; 42 U.S.C.A. § 1971 et seq.; Voting Rights Act Amendments of 1970, § 5, 42 U.S.C.A. § 1973c; U.S.C.A. Const. Amends. 14, 15.

3. Elections — 48

There is no federal constitutional right either to contiguity or compactness of voting districts. U.S.C.A. Const. Amends. 14, 15.

Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Nathan Lewin Washington, D.C., and Dennis Rapps, Brooklyn, N.Y., of counsel), for plaintiffs.

Louis J. Lefkowitz, Atty. Gen. of N.Y. (George D. Zuckerman, Asst. Atty. Gen., of counsel), for defendants, Wilson, Ghezzi, Anderson and Duryea.

William B. Saxbe, Atty. Gen. of U.S. (Richard Seldin, Washington, D.C., and David G. Trager, U.S. Atty., E.D.N.Y., of counsel, for defendant, United States.

Jack Greenberg and Eric Schnapper, New York City, for N.A.A.C.P., and others, applicants for intervention.

BRUCHHAUSEN, District Judge.

This suit was instituted to declare the recently drawn redistricted lines of the State Senatorial, State Assembly and U.S. Congressional Districts in Kings County, pursuant to Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, unconstitutional.

On April 1, 1974, the Attorney General of the United States through his authorized representative, J. Stanley Pottinger, contacted the office of the Attorney General of the State of New York advising him that the Assemblanic, Senatorial and Congressional district lines in Kings County established pursuant to the applicable laws of 1972 were invalid under Section 5 of the Voting Rights Act because it was determined by the Attorney General of the United States that those lines would produce a racially discriminatory effect, Exhibit VI annexed to the complaint. That determination precluded the use of those district lines within Kings County. The Attorney General of the State of New York concluded to accept that determination and not to appeal the decision of Mr. Pottinger. It is alleged in the memorandum of the N.A.A.C.P. and not controverted that several groups sought to appeal the ruling of Mr. Pottinger, but met with failure when their actions were dismissed by the District Court for the District of Columbia. The New York State Legislature on May 30, 1974 enacted new lines in an attempt to comply with removing any discriminatory aspects of the 1972 lines, and to comply with the determination of the Attorney General of the United States. These new lines were submitted for approval, pursuant to the Voting Rights Act.

It is alleged that the 1974 redistricting laws violate the rights of the plaintiffs in denying them the equal protection of the laws and in depriving them of liberty without due process of law in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and are, consequently, invalid. In short, the plaintiffs, members of the Hasidic community in Williamsburgh, object to be divided into separate senatorial and assemblanic districts by the challenged 1974 State statutes.

The defendants then moved for a dismissal of the complaint for failure to state a claim for which relief can be granted and for lack of jurisdiction.

Subsequent to a full hearing before this Court, on July 1, 1974, Mr. J. Stanley Pottinger, acting on behalf of the Attorney General of the United States, gave approval of the new 1974 lines as not being violative of the Voting Rights Act. See letter addressed to the Attorney General of the State of New York together with a Memorandum and Decision attached to the Supplemental Memorandum for the N.A.A.C.P., appearing as *amicus curiae*.

The position of the plaintiffs is untenable, and the notions of the defendants to dismiss are granted.

[1] In view of the approval of the 1974 lines by the office of the Attorney General of the United States, the cause of action brought pursuant to the Voting Rights Act must be dismissed. In *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1, the Court held in part at page 548, 89 S.Ct. at page 822:

"In *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), we held the provisions of the Act involved in these cases to be constitutional. These cases merely require us to determine whether the various state enactments involved are subject to the requirements of the Act."

The Court further held in part at pages 549, 550, at pages 823 of 89 S.Ct.:

"* * * Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5."

[2] The allegations by the plaintiffs of a violation of their rights pursuant to the Fourteenth and Fifteenth Amendments to the Constitution are also untenable. Jurisdiction is noted pursuant to 28 U.S.C.A. § 1343, and 42 U.S.C.A. § 1983.

In *Ince v. Rockefeller*, S.D.N.Y., 290 F.Supp. 878, the Court held in part at page 883:

"* * * Pleas for separate community recognition, similar to those raised by plaintiffs here, were made by intervenors from Flatbush and Bay Ridge in contesting the recently enacted congressional districts in New York State. In rejecting their contentions, the three-judge Court in its unanimous opinion in *Wells v. Rockefeller*, 281 F.Supp. 821, 825 (S.D.N.Y. 1968) stated:

"The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side. The twenty or more identifiable communities of Brooklyn may well have preserved their own traditions from the days of the Dutch, although in today's rapidly changing world, this is doubtful. But even Brooklyn's large population will not support twenty community congressmen. Of necessity, there must be lines which divide.' "

[3] It is further well settled that there is no federal constitutional right either to contiguity or compactness of voting districts. *Wood v. Broom*, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131.

The case at bar is unlike that in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 where the Alabama legislature by alteration excluded all but five of 400 Negro voters from the City of Tuskegee voting rolls. In this case as in the *Ince* case, *supra*, no one is being disenfranchised by the redistricting and no voting right is being extinguished.

It is further well settled that racial considerations have been approved to correct a wrong. The use of a pupil assignment plan, based on race, was upheld in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554.

In *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir., 1968), racial considerations were sustained in promoting integration. See also *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir., 1973).

In the field of labor, racial quotas requiring preferential hiring were sustained to overcome prior discrimination, *Associated General Contractors of Mass. Inc. v. Altshuler*, 1 Cir., 490 F.2d 9, cert. denied 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974).

The Court after careful consideration of the record, arguments and applicable law concludes that the plaintiffs' motions for a preliminary injunction and summary judgment be denied. The defendant's motions to dismiss the complaint are granted.

It is so ordered.

SEP 5 1975

JOSEPH ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,

Petitioners,

v.

HUGH L. CAREY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF
AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION
LEAGUE OF B'NAI B'RITH and JEWISH LABOR
COMMITTEE, *AMICI CURIAE*, IN SUPPORT
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IN THE
Supreme Court of the United States
October Term, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, *et al.*,
Petitioners,
v.
HUGH L. CAREY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF
AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION
LEAGUE OF B'NAI B'RITH and JEWISH LABOR
COMMITTEE, *AMICI CURIAE*, IN SUPPORT
OF THE PETITION

Petitioners have challenged certain reapportionment laws adopted by the State of New York, in so far as they affect areas of Kings County, on the ground that the district boundaries were purposefully drawn on the basis of race, in violation of the 14th and 15th Amendments to the

United States Constitution. Their complaint was dismissed and the decision was affirmed, 2 to 1, by the Court of Appeals for the Second Circuit. A petition for writ of certiorari to review the judgment of the Court of Appeals was filed in this Court on July 18, 1975.

Interest of the *Amici*

This brief is submitted on behalf of three national Jewish organizations, the American Jewish Congress, the Anti-Defamation League of B'nai B'rith and the Jewish Labor Committee. The American Jewish Congress was founded in 1906 and the Jewish Labor Committee in 1934. The B'nai B'rith was founded in 1843 and established its Anti-Defamation League as its educational arm in 1913.

All three of these organizations are concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since their creation, they have opposed racial and religious discrimination in voting, employment, education, housing and public accommodations. Among their activities devoted to these ends, they have filed briefs as *amici* in this Court in cases where it was felt that the rights of any racial, religious or ethnic group have been threatened. These cases have included *Shelley v. Kraemer*, 344 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 374 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Lau v. Nichols*, 414 U.S. 563 (1974).

More specifically, in the area of voting rights, certain of the *amici* filed a friend of the Court brief in *Cardona v.*

Power, 384 U.S. 672 (1966), urging the unconstitutionality of the New York State literacy test on the grounds that it unlawfully disenfranchised American citizens of Puerto Rican origin.

We submit this brief because we believe that our system of constitutional liberties is impaired when the law gives sanction to the use of race in the decision-making processes of governmental agencies, except in certain circumstances where it is necessary to correct past purposeful discrimination.¹ We regard as unsound the basic postulates on which the 1974 New York reapportionment statutes rested. If those postulates and the resulting reapportionment are upheld, sanction will be given to racial proportional representation, racial and ethnic divisiveness will be intensified, and the process of popular elections on which our government rests will be seriously distorted.

Accordingly, *amici* have sought and obtained the consent of the parties to this case to the submission of this brief.

Statement

Early in 1972, the State Legislature adopted Chapter 11 of the Laws of New York, 1972, reapportioning the legislative districts of the state on the basis of the 1970 census. Because a literacy test had been in effect in November 1968

1. It is the view of *amici* that, under the First Amendment, the limitations on governmental discrimination based on race are to a large extent applicable also to discrimination based on religion. We confine ourselves in this brief, however, to consideration of distinctions based on race. That is the only issue presently involved in this proceeding since Petitioners do not question here the unanimous conclusion of the Court of Appeals that they did not have standing to sue as a religious group and that they did not have any right to relief as such a group (510 F.2d at 250-51).

and less than 50% of the voting age residents in Kings County and two other counties in New York State had voted in the presidential election that year, it had been determined in 1970 and 1971 that the trigger provisions of Section 4 of the Voting Rights Act (42 U.S.C. Sec. 1973b) applied to these areas.²

Section 5 of the Act (42 U.S.C. Section 1973c) requires approval by either the United States District Court for the District of Columbia or the United States Attorney General of any change in the laws affecting voting in a state or county held subject to Section 4 of the Act. Accordingly, Chapter 11 of New York's 1972 Laws was submitted to the Attorney General for approval insofar as it applied to the three counties held to be covered by Section 4 of the Voting Rights Act.

On April 1, 1974, the United States Department of Justice, through Assistant Attorney General J. Stanley Pottinger, informed the New York Attorney General's office that the redistricting in Kings and New York Counties was not acceptable because "we cannot conclude, as we must under the Voting Rights Act, that those portions of these redistricting plans will not have the effect of abridging the right to vote on account of race or color." The Attorney General noted that certain of the lines in these areas had the effect of "overly concentrating" minority populations in certain districts while "diffusing" the remaining minority population into a number of other districts.

2. Application of the Section was at one point lifted but was then held to be still in effect because of a ruling in a separate proceeding that New York State's failure to provide a Spanish translation of the ballots used in the 1973 election constituted illegal use of a literacy test in violation of the Act. *Torres v. Sachs*, 381 F. Supp. 309 (S.D. N.Y. 1973).

Because of the imminence of the primary and general elections of 1974, the state did not exercise its right to challenge this ruling but proceeded to adopt new apportionment laws for those two counties. (Laws of New York (1974), Chapters 588-591 and 599). It is not questioned that these statutes were drafted to meet the objections expressed by the Department of Justice in the April 1 letter and that New York's legislative draftsmen understood that in order to meet these objections it was necessary to assure that there would be three Senate and two Assembly districts in Kings County with non-white majorities of at least 65 per cent. New district lines, so drafted, were enacted and again submitted to the Attorney General. In a Memorandum of Decision dated July 1, 1974, they were given the approval required by statute.

These proceedings were initiated in the United States District Court for the Eastern District of New York on June 1, 1974. Petitioners (plaintiffs below), are organizations of voters residing in areas of Kings County affected by the new apportionment laws. Their constitutional challenge asserted their rights, both as whites and as members of a discrete religious group, to legislative boundary lines drawn without conscious, deliberate effort to establish specific racial proportions in designated districts.

Question Presented

Amici ask this Court to grant review of the judgment below to consider the question whether under the 14th and 15th Amendments, apportionment laws may be deliberately drawn to assure minority groups voting control in certain

legislative districts, where there has been no affirmative finding that the prior apportionment was designed to reduce or suppress minority representation.

Reasons for Granting the Writ of Certiorari

- I. This case presents a vitally important issue as to the validity of racial gerrymandering; its importance has been magnified by recent legislation extending the Voting Rights Act to additional ethnic groups.**

This case raises a narrow but critical point—whether the New York State Legislature acted appropriately by employing a racial quota in legislative apportionment so as to assure particular racial groups voting control of certain districts, in the absence of any affirmative finding, judicial or administrative, of a prior discriminatory apportionment designed to reduce or suppress the representation of these groups. Although this is a narrow question, its resolution is of extreme importance. The legal issues raised here will undoubtedly come before the federal courts with increasing frequency because of the recent extension of the Voting Rights Act to substantial areas outside the Southern states, many of which like New York do not have a history of past state-imposed racial discrimination in the apportionment process, and the extension of the Act to specifically cover not only Blacks but persons of Spanish heritage and a number of other language minorities. The need to provide the 33 non-Southern state legislatures soon to be covered by the Voting Rights Act with guidance as they grapple with the complex problems of meeting their responsibilities under that Act and the United States Con-

stitution adds a special urgency to the issues presented here.

All parties to this case, and both the majority and dissenting judges in the Court below, agree that the challenged state legislative plan involved in this case was “specifically drawn to ensure nonwhite voters a ‘viable majority’ * * * in state senatorial and assembly districts” 510 F.2d 512, 514. As more particularly described by the dissenting justice below: “* * * [T]he Legislative Committee staff proceeded to redraw lines under a controlling mandate to see that seven Assembly and three Senate districts had nonwhite majorities of 65% or greater. The 65% figure was taken on the explicit premise that anything less (given lower rates of voter registration and turnout) would render uncertain the power of the nonwhite majority to control election results in those districts.”

This Court’s decisions leave no room for doubt that a legislative apportionment scheme designed to achieve electoral control by particular racial groups, control which inevitably fences out other groups, could not constitutionally be adopted. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 399 (1960); *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964). The Court has also recognized that allegedly “benign racial districting,” even if intended to correct past state apportionments which had virtually deprived Negroes of representation in the state legislature for 75 years and occurring in a context of historic voting, education and other state-imposed racial discrimination, presents a substantial federal question. And it has yet to give constitutional sanction to such action. *Taylor v. McKeithen*, 407 U.S. 191, 193-4 (1972).

Nevertheless, the Court below justified New York's admitted effort to establish racial electoral quotas in defined legislative districts because, "Here the New York legislature was not 'starting afresh'; the State had run afoul of the Voting Rights Act" (510 F. 2d 512, 525) and the racial proportional representation decreed in these districts was necessary "[t]o correct an invidious discrimination in favor of white voters and against non-whites which had occurred in Kings County * * *" (510 F. 2d 512, 515).

We submit, however, that neither the factors which made Kings County subject to the provisions of the Voting Rights Act nor the ambiguous, unfocused findings of the Attorney General with respect to the 1972 apportionment, taken singly or together, justify a "remedy" requiring racially conscious gerrymandering designed to assure working majorities to members of particular races.

II. An election violation arising from the requirement of a literacy test or the provision of an English-only ballot cannot constitutionally be cured by the application of racial quotas to redistricting in the absence of an affirmative finding that the prior apportionment was designed to reduce or suppress minority representation.

A. The Absence of Relationship Between the Remedy and the Violation

The rationale for permitting considerations of race to enter into remedies designed to correct past discrimination requires that the correction be intimately related to the particular violation and the harm it created. "[T]he nature of the violation determines the scope of the remedy." *Mil-*

liken v. Bradley, 418 U.S. 717, 738 (1974); *City of Richmond v. United States*, 95 S.Ct. 2296 (June 24, 1975). Here no such relationship exists; the "foul" under the Voting Rights Act which triggered the operation of Section 5 relied on by the Court of Appeals majority had nothing to do with the type of apportionment adopted for Kings County (510 F. 2d at 517). Kings County became subject to the approval requirements of Section 5 of the Voting Rights Act because (a) a literacy test had been in effect on November 1968; (b) it had been found that less than 50% of the persons of voting age were registered or had voted in November 1968; and (c) although that literacy test was no longer in effect and New York State had been viewed as being in full compliance with the statute, a United States District Court had ruled that New York had violated the Voting Rights Act because it conducted an election with ballots in English only.

The state legislative policy that shaped the 1974 statute was that the Black and Puerto Rican minority viewed as a bloc must have a substantial majority in a specified number of legislative districts. This consideration is totally unrelated to the evil that had caused the Voting Rights Act to be invoked—the disenfranchisement of non-English speaking voters because the ballots used in an election were only in English. The victims of this practice were the Spanish-speaking minority alone, not the Blacks. Even assuming it were constitutionally appropriate to correct the failure to print ballots in Spanish by redrawing district lines, the 1974 lines did not assure or even create the potential of increased specific representation of the Puerto Rican group. (See the Department's Memorandum of Decision, July 1, 1974, pp. 14-16.)

Nor does change of district lines to give working control to minorities ever effect a cure of the evil caused by a literacy test or ballot infringement. That cure is effected by the elimination of the improper test and the printing of the ballot in the appropriate language. At that point the discrimination against the minority voter is remedied, and he can then go to the polls at the next election and achieve the representation due him in the newly-elected legislature.

This is not a case in which racial preferences need be ordered to provide relief for individual victims of employment discrimination³ or where the composition or structure of an existing work force is the result of past discrimination and can only be changed by injecting racial considerations into employment decisions.⁴ Nor is it a school integration case in which racial considerations must be considered to assure disestablishment of a segregated system and creation of a unitary system.⁵ Here, by the elimination of the appropriate test and the printing of the ballot in the appropriate language the violation is rectified. As a further remedy, the Voting Rights Act requires that any changes in voting qual-

3. See, e.g., *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972).

4. *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1971), cert. den. 406 U.S. 950 (1972); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971); see also *United States v. Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), cert. den. 404 U.S. 984 (1971); *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972); *United States v. International Brotherhood of Electrical Workers Local 212*, 472 F. 2d 634 (6th Cir. 1973); *United States v. Wood, Wire & Metal Lathers Union, Local 46*, 471 F. 2d 408 (2d Cir. 1973); *Bridgeport Guardians, Inc. v. Commission*, 482 F. 2d 1333 (2d Cir. 1973).

5. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

ifications or procedures including redistricting must be approved, in order to assure that such changes do not have a racially discriminatory purpose or effect. Nowhere, however, does that Act and its recent hotly debated extension, require or even authorize, as a remedy for any past possible underrepresentation which may have resulted from the existence of a literacy test or English-only ballot, the drawing of district lines to guarantee working control in particular districts to the minorities who might have been affected by these devices.

B. There Was No Affirmative Finding that the 1972 Apportionment Was Designed to Reduce or Suppress Minority Representation

The Court of Appeals, however, argued that the state's prior use of the literacy test and untranslated English ballot coupled with the 1972 redistricting constituted "invidious discrimination in favor of white voters and against nonwhites * * *" and thus justified the 1974 racial gerrymander. (510 F.2d 525).

As we have shown, the mere existence of the trigger factors does not warrant the extraordinary remedy of drawing district lines to assure certain races voting control of particular legislative districts.

Nor did the Attorney General affirmatively find such "invidious discrimination" in the drawing of the 1972 lines as to give constitutional sanctions to such a remedy. The Attorney General stated:

"First, with respect to the Kings County congressional redistricting, the lines defining district 12 and

surrounding districts *appear* to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our own analysis reveals none. Moreover, it appears that other rational and compact alternative districting could achieve population equality without such an effect. (emphasis added)

"Senate district 18 *appears* to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population *appears* to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts." (emphasis added)

He concluded:

"* * * on the basis of all the available demographic facts and comments received * * * as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color, we have concluded that the proscribed effect *may* exist in parts of the plans in Kings and New York County." (emphasis added)

We recognize, of course, that the process of legislative apportionment can be used to disfranchise voters and that it has been so used against non-whites. It is for that reason that this Court held, in *Georgia v. United States*, 411 U.S. 526 (1973), that apportionment measures were included among those that must receive review under Section 5

where the trigger provisions of Section 4 are operative. And in *White v. Regester*, 412 U.S. 753 at 765, this Court established beyond cavil that apportionment procedures may not be used "to cancel out or minimize the voting strength of racial groups."

But the Attorney General's decision does not rise to an affirmative finding that the 1972 apportionment, in so far as it affected Kings County, was employed for that purpose or had that effect. At best his tentative, vague and negatively phrased conclusion might be said to reflect an underlying assumption that use of the word "effect" in Section 5 of the Voting Rights Act requires that legislative districting be approved under that Act only when it assures minority groups actual representation in the legislature in virtually exact proportion to their numbers in the voting age population.⁶ That is of course how the drafts-

6. We are aware that, as the Court of Appeals noted (510 F. 2d at 520), the procedures followed after issuance of the April 1 ruling preclude that ruling being set aside in the instant proceeding. But that means only that this proceeding cannot result in a judgment reinstating the 1972 statutes which the Department of Justice action invalidated. It does not mean that the interpretation of the Voting Rights Act expressed by the Attorney General in the April 1 letter is the law of the land or even the law of this case. The courts can still invalidate the 1974 reapportionment if it is constitutionally unsound. And the notion that, regardless of whether it is unsound, it can and must be upheld because prompted by the ruling of April 1, which the state declined to challenge, is patently untenable. Otherwise, the right of other parties to challenge statutes affecting election procedures in a "traditional suit," recognized by the court below (510 F. 2d at 519-20), would be meaningless.

It should be remembered that the petitioners here had no reason to challenge the 1972 apportionment (because they were not injured by it) and had no standing to challenge the April 1 ruling (because they were not injured until the 1974 statutes were adopted). They took their first opportunity to bring the present "traditional suit." It would be intolerable if they were barred from questioning the legal conclusions of the April 1 ruling (and therefore the legality of the 1974 statutes) because the state failed to exercise its statutory rights.

man of the challenged districting interpreted the Attorney General's decision and the subsequent comments of members of his staff. Whether they did so mistakenly or not is immaterial; they acted upon it and the 1974 statute is based on that understanding. It is a construction of the word "effect" in Section 5 which, we urge, distorts the meaning of the statute and intent of Congress, introduces mischievous, dangerous, divisive and impermissible considerations into the apportionment process and differs significantly from the expressed position of this Court.

C. A Finding of Prohibited Effect Under Section 5 of the Act Does Not Justify Racial Gerrymander of Districts so as to Assure Racial Proportional Representation in the Legislature.

Only recently in *City of Richmond v. United States*, 95 S. Ct. 2296 (June 24, 1975) this Court considered the meaning of the "effect" clause in an annexation case. Addressing the question of whether the annexation involved had the prohibited effect under Section 5, the Court held that even if it resulted in the *reduction* of the representation of minority groups, the prohibited "effect" would not be found so long as minorities were afforded representation reasonably equivalent to their political strength in the enlarged community. This is a far cry from the mathematical exactitude and 65% quota requirement imposed in the instant case.

The *Richmond* case, moreover, did not involve apportionment and dealt with a situation in which it had been found that the challenged governmental action "was infected by the impermissible purpose of denying the right to vote

based on race through perpetuating white majority power to exclude Negroes from office * * *" (95 S.Ct. at 2305).

This case presents the critical question, not previously decided, whether the Voting Rights Act, in the absence of proof of such impermissible purpose, should be interpreted as permitting a finding that an apportionment statute has the "effect" of abridging the right to vote when lines are drawn in such a way that the proportion of legislative districts controlled by non-whites is not equal to their proportion in the population. More precisely—and more important to our traditional concepts of representative democracy and the electoral process—the issue is whether legislative action to correct this alleged "prohibited effect" *must* assure such control by racially gerrymandering districts so as to place sufficient numbers of such racial group in each district to make certain that such group has not only the opportunity to elect representatives in proportion to its numbers in the population but also sufficient excess population in each district to *guarantee* such representation.

We submit that the Voting Rights Act was never intended to achieve such a result. We agree with Judge Frankel, in his dissent below, when he stated (510 F. 2d at 533) that:

"There are unbearable and absurd implications in the notion of 'proportionality' between racial or ethnic *population* percentages and percentages of *districts* controlled by different racial or ethnic groups. Beyond the limited skin-color divisions, some 65% white and 35% 'nonwhite,' Kings County has 10.7% Italian immigrants or people with at least one parent who im-

migrated from Italy, some unknown additional percentage of Italian ancestry, a similar figure of 5.9% plus unknown additional Russian, 35% Puerto Rican, 1.7% recently from Austria, 1.7% recently from Ireland (plus many more of Irish ancestry), 30.3% Jewish, 2.2% 'other' religions, 1.3% recent German immigrants, plus a dizzying mass of others 'whose lineage is so diverse as to defy ethnic labels.' *DeFunis v. Odegaard*, 416 U.S. 312, 332 (1974) (Douglas, J. Dissenting). How do we figure out the percentage of districts to be controlled by German Catholics, Russian Jews, black as against white Protestants, etc.? The short answer is, of course, that we don't. But the apparent 'test' in today's majority opinion (31.4% non-white districts a 'good' figure because less than the 35.1% nonwhite Kings County population) implies that perhaps we should."

One particularly anomalous result is the fate of the Puerto Rican minority in this case. Although the Department of Justice in its July 1, 1974, ruling assumed that this group enjoyed the same rights under the Voting Rights Act as Negroes (pp. 10-11), it found no way to give them "proportionate" representation (pp. 14-16).

Judge Frankel's recital of the complications which would result from approval of the challenged New York statutes and the underlying assumptions on which they rest is not mere *reductio ad absurdum*. Under the newly enacted extension of the Voting Rights Act, if the decision below is upheld, Judge Frankel's prediction of the complex decisions which would have to be made to assure propor-

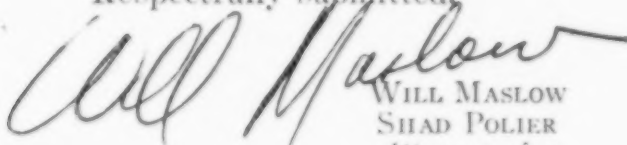
tionality for racial and ethnic groups in voting will become a reality.

As indicated previously, the Voting Rights Act as extended now will cover not only such non-Southern areas as parts of New York, California, Colorado and Alaska but will protect non-English speaking minorities, including Alaskan natives, persons of Spanish heritage, Asian Americans and American Indians. Pub. L. No. 94-73 (July 24, 1975). The complexities of determining initially whether apportionment laws have the "effect" of abridging the right to vote of each of these groups—in addition to Blacks and Puerto Ricans—and the further difficulties of devising remedies which allot particular groups effective voting control over a sufficient number of districts to assure their proportionate representation in the legislature, boggle the mind. Protecting each particular group, under the "standards" employed by the New York Legislature and approved by the Court below, without at the same time trenching on the rights of other protected groups, or failing to respect historic boundaries and assure compact and contiguous districts, would appear impossible.

But the administrative difficulties created by the interpretation below are the least of the matter. The philosophic implications, the damage to our society through acceptance of its assumptions, are its heart. The concept that particular racial or ethnic groups are entitled to guaranteed representation is divisive and creative of intergroup friction; it elevates group rights over individual concerns, and is productive of legislative representatives who are racial, ethnic and religious partisans rather than concerned

about the interest of the community as a whole. In fact, districting along racial lines has been likened to illegal segregation by race.⁷ Nothing in the Voting Rights Act commands the result below and we urge the Court to grant the petition for certiorari so that it may definitely reject the position enunciated therein.

Respectfully submitted,



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7. See Justice Douglas dissenting in *Wright v. Rockefeller*, 376 U.S. 60, 61-67 (1964).

JAN 21 1976

MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM 1975

—
No. 75-104
—

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC.,
et al., *Petitioners*,

v.

HUGH L. CAREY, et al.,
Respondents.

—
ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
—

PETITION FOR WRIT OF CERTIORARI FILED JULY 17, 1975

CERTIORARI GRANTED NOVEMBER 11, 1975

Supreme Court of the United States

OCTOBER TERM 1975

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UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC.,
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Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 74-2037

UNITED JEWISH ORGANIZATION OF WILLIAMSBURG

v.

MALCOLM WILSON

Date—Filings—Proceedings—Filed

• • • • •

8-23-74—Denial of preliminary injunction affirmed; opinion
and final determination of the appeal to follow, Per
Curiam

• • • • •

Docket Entries

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Date—Filings—Proceedings—Amount Reported in
Emolument Returns

6-11-74—Complaint filed. Summons issued.—1 JS5

6-12-74—Notice of motion for a Temporary Restraining
Order ret 61774 at 10 A.M. filed.—2

• • • • •

6-20-74—By BRUCHHAUSEN, J.—Memorandum and order dtd
6-20-74 denying motion for three judge court filed.
(p/c mailed to plttf.).—4

6-21-74—Stenographer's transcript of June 17, 1974 filed.

6-25-74—Notice of motion to dismiss complaint ret 7-5-74
at 10 A.M. filed.—6

6-26-74—Motion and memorandum of law in support of
motion for summary judgment in favor of plttf filed.
—7/8

* * * * *

6-26-74—Stenographer's transcript dtd 6-20-74 filed.—11

* * * * *

7-3-74—Answer of deft filed.—14

* * * * *

7-12-74—Notice of appeal filed. Duplicate mailed to C of A
& deft. jn.—17

* * * * *

7-26-74—By BRUCHHAUSEN, J.—Order dated July 25, 1974
filed that plttf motions for a preliminary injunction
and summary judgment be denied. The defts motions
to dismiss the complaint are granted. Copies sent to
the attys.—20 JS6

* * * * *

7-30-74—Notice of appeal filed. JN Copy mailed to C of A.
—21

* * * * *

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

No. 740-877

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC.

82 Lee Avenue
Brooklyn, N.Y.

ALBERT FRIEDMAN
71 Lee Avenue
Brooklyn, N.Y.

HELEN GREENWALD
131 Heyward Street
Brooklyn, N.Y.

LEOPOLD LEFKOWITZ
85 Taylor Street
Brooklyn, N.Y.

ALEXANDER W. NOJOVITS
154 Wilson Street
Brooklyn, N.Y.

HENRIETTE FRIEDMAN
71 Lee Avenue
Brooklyn, N.Y.

HAROLD KLAGSBALD
172 Rutledge Street
Brooklyn, N.Y.

DAVID LINDNER
198 Wilson Street
Brooklyn, N.Y.

JULIUS TEMPLER
104 Heyward Street
Brooklyn, N.Y.
* Plaintiffs,

v.

MALCOLM WILSON
Governor of the State of New York
State Capitol
Albany, N.Y.

JOHN GHEZZI
Secretary of State of New York
State Capitol
Albany, N.Y.

WARREN ANDERSON
Temporary President of the New York Senate
State Capitol
Albany, N.Y.

PERRY DURYEA, JR.

Speaker of the New York Assembly
State Capitol
Albany, N.Y.

NEW YORK CITY BOARD OF ELECTIONS
80 Varick Street
New York, N.Y.

ATTORNEY GENERAL OF THE UNITED STATES
Department of Justice
Washington, D.C. 20530

Serve: David G. Trager
United States Attorney
for the Eastern District of New York
U.S. Courthouse
Brooklyn, N.Y.

Defendants.

Complaint for Declaratory Judgment and Injunction

Jurisdiction

1. This is an action to enjoin the enforcement and application of laws of the State of New York, adopted on May 29, 1974, which deprive the plaintiffs and other similarly situated voters who are residents of the Williamsburgh section of Brooklyn, New York, of rights, privileges and immunities secured by the Constitution and by the laws of the United States, including the nondiscriminatory right to vote, as hereinafter more fully appears. Plaintiffs also seek a judgment declaring that the State laws at issue, specifically Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, deny them the equal protection of the laws and deprive them of liberty without due process of law in violation of the Fourteenth and Fifth Amendments to the United States Constitution and are, consequently, invalid.

2. This Court has jurisdiction of this action pursuant to Sections 1331, 1343 and 1357 of Title 28, United States Code. The right to vote of each of the plaintiffs and of those associated with the plaintiff organization exceeds, in value, the amount of Ten Thousand Dollars.

Parties

3. United Jewish Organizations of Williamsburgh, Inc., is a nonprofit community organization which includes, as constituent members, approximately one hundred Jewish community groups and organizations in the area of Williamsburgh, Brooklyn. It has, as an "umbrella" community organization, led efforts in recent years to encourage registration and voting, as well as political awareness, among the Jewish residents of the Williamsburgh section of Brooklyn.

4. Each of the individual plaintiffs is a citizen of the United States and a voter registered at the address shown in the caption of this complaint. Each of the plaintiffs is also an adherent of the Orthodox Jewish faith and a member of the Hasidic community located in Williamsburgh. As hereinafter more fully appears, the right of each plaintiff to cast an effective vote for the New York State Senate and Assembly, as well as for the United States Congress, has been unconstitutionally infringed by the challenged actions of the New York Legislature and the United States Department of Justice. The defendants are sued in their capacities as public officials responsible for the enactment and application of the laws of New York and the United States.

The Claim

5. This action concerns the effect of Chapters 588, 589, 590, 591 and 599 of the 1974 New York Laws on the voters who reside in the section of Brooklyn bordered by the East River, South 6th Street and Broadway, Walton Street, and

Wallabout Street. This area is marked in red on the map attached hereto as Exhibit I.

6. The area described in paragraph 5 takes in substantially all of Census Tract Numbers 509, 525, 529, 531, 533, 535, 537, 539, 545, 547, 549, as shown on Exhibit I. According to the 1970 United States Census figures, the total population of these tracts was 37,299, of which 33,260 persons were white, 3,327 were black, and 712 were classified as "other."

7. The white residents of this area are overwhelmingly adherents of the Orthodox Jewish faith and form a closely knit community of *Hasidim*, which found this refuge in the United States during and after the holocaust of the Second World War. For more than 25 years this *Hasidic* community, led in all spiritual matters by its rabbi and, in other community activities, by selected members, has lived in the Williamsburgh section and developed a substantially self-sustaining and totally law-abiding community in that area. Because of distinctive religious practices, which result in modes of dress and appearance that immediately identify those who are members of the community, the *Hasidic* Jews who are residents of this area have encountered substantial discrimination and hostility from some segments of society. They have, as a result, turned increasingly in recent years to their elected officials to secure protection of their rights to live peacefully and free of illegal discrimination.

8. During all the time that the *Hasidic* community has resided in the Williamsburgh area, the area described in paragraph 5, which has formed the boundary of its community, was always recognized as a single community for electoral purposes. At all times during the past 25 years, the entire area was included within one State Senate District and one State Assembly District.

9. The inclusion of the area described in paragraph 5 within one Senate District and one Assembly District en-

couraged the plaintiffs and those similarly situated to register, to vote and to participate in the democratic process in order to secure the rights growing out of that process. The legislators elected from the said districts were, in the view of the plaintiffs, responsive to their needs since the *Hasidic community* constituted a large and effective voting bloc in those districts.

10. The unity of the area described in paragraph 5 hereof was recognized by the Judicial Commission established by the New York Court of Appeals in March 1966. The relevant State Senate and Assembly Districts fixed by that Commission and implemented under orders of the New York Court of Appeals between 1966 and 1972 are shown on Exhibits II and III attached to this complaint. The area affected was included, in its entirety, in State Senate District No. 14 and in Assembly District No. 57.

11. Acting under instructions from the New York Legislature, the Joint Legislative Committee on Reapportionment issued a report on December 14, 1971, recommending revisions of electoral lines in the State Legislature. Its recommendations, which were adopted by the legislature in 1972 as Chapters 76, 77 and 78 of the 1972 Laws, recognized the unity of the area described in paragraph 5 hereof. Under the 1972 reapportionment, the area was assigned to the 57th State Assembly District and to the 17th State Senatorial District. Exhibits IV and V attached to this complaint show the relevant districts.

12. On April 1, 1974, the defendant ATTORNEY GENERAL OF THE UNITED STATES, acting through and by the Hon. J. Stanley Pottinger, Assistant Attorney General, issued a letter stating his view that the apportionment lines established by Chapters 76, 77 and 78 of New York's 1972 Laws was invalid under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. A copy of the letter is attached to this complaint as Exhibit VI. The defendant's

letter stated that the 1972 apportionment was invalid in Kings County, in part, because "Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts" and because "[i]n the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts." The legal effect of this letter, under the terms of the Voting Rights Act, was to render the 1972 reapportionment invalid and unenforceable unless and until a three-judge District Court for the District of Columbia would disagree with the ATTORNEY GENERAL's conclusion.

13. The conclusion of the defendant ATTORNEY GENERAL was based *not* on any finding, evidence, or lack of evidence, tending to establish that there was purposeful racial gerrymandering, designed to reduce black representation in the State Legislature, when the 1972 reapportionment and the 1966 reapportionment were drawn up.

14. The conclusion of the defendant ATTORNEY GENERAL rested entirely on the finding by his agents and employees that the *effect* of the 1972 lines was to "abridge the right to vote on account of race or color" in violation of the Voting Rights Act.

15. The conclusion of the defendant ATTORNEY GENERAL did not rest on any finding, evidence, or lack of evidence tending to show that there was a history of past official discrimination against the black electorate of Kings County which could only be corrected by deliberate maximization of black voting strength in elections to be held in 1974.

16. The conclusion of the defendant ATTORNEY GENERAL with regard to Kings County rested entirely on his view that it was possible to draw district lines adjoining Senate District 18 and Assembly Districts 53, 54, 55, 56 which

would create "substantial black majorities" in such other districts.

17. Agents and officials of the New York Legislature and its Joint Committee on Reapportionment were told by agents of the defendant ATTORNEY GENERAL that their obligation under the Voting Rights Act would be met only if they created other Senate and Assembly districts with "substantial black majorities." As the result of meetings with attorneys of the Department of Justice, acting under the direction of the ATTORNEY GENERAL, agents of the New York Legislature concluded that it was their obligation, in view of federal officials, to create more districts that contained at least 65 percent black population.

18. The Joint Committee on Reapportionment and, on information and belief, a majority of the New York Legislature, disagreed with the conclusion of the Attorney General. Because of the "exigencies of time," however, the defendant GOVERNOR OF THE STATE OF NEW YORK, acting through the Office of the Attorney General of the State, determined not to challenge the said conclusion by the procedure authorized under the Voting Rights Act, but instead seek to satisfy the demands of the defendant ATTORNEY GENERAL OF THE UNITED STATES by new legislation.

19. On May 27, 1974, without any advance hearing or formal solicitation of views from the public, the New York Joint Committee on Reapportionment issued a report recommending changes in the 1972 reapportionment lines "to effect compliance with the United States Department of Justice determination of April 1, 1974." A copy of the body of that report and the Appendices thereto setting out "Criteria for Establishing Ethnic Composition" for the Kings County Assembly, Senate and Congressional Districts are attached hereto as Exhibit VII.

20. The actions of the Joint Committee on Reapportionment and its recommendations were guided principally by

racial criteria. The Committee was race-conscious throughout its consideration of how to comply with the ATTORNEY GENERAL's "determination of April 1, 1974."

21. Employees of the Joint Committee met on several occasions with attorneys of the U.S. Department of Justice to discuss how compliance could be obtained. On each occasion, on information and belief, employees of the Department of Justice emphasized the need to arrange lines so that there would be "substantial black majorities" in more Senate and Assembly districts.

22. The opinion communicated to employees of the Joint Committee was, on information and belief, that black majorities of between 55 and 60 percent would be insufficient to secure approval from the defendant ATTORNEY GENERAL, and that it would be necessary to achieve a percentage approximating 65 percent to satisfy the Department of Justice's criteria.

23. The district lines challenged in this case were drawn as a result of the erroneous and unconstitutional demands and standards imposed by agents of the defendant ATTORNEY GENERAL OF THE UNITED STATES and pursuant to the racial criteria established by the Joint Committee at the insistence of the United States Department of Justice.

24. Exclusively because of these improper and unconstitutional demands, the New York Legislature, on the recommendation of the Joint Committee, divided the community described in paragraph 5 between two Senate and Assembly Districts. The boundary between the 57th and 58th Assembly Districts, pursuant to Chapter 588 of the 1974 New York Laws, is, in part, Marcy Avenue, the Brooklyn-Queens Expressway, Bedford Avenue, Heyward Street, and Wythe Avenue. The boundary between the 25th and 23rd Senate Districts, pursuant to Chapters 588, 591, 599 of the 1974 New York Laws, is the Brooklyn-Queens Expressway. The

relevant Senate and Assembly Districts are shown in Exhibits VIII and IX attached to this complaint.

25. The result of this proposed redistricting is unjustifiably to divide in half, for electoral purposes, the community represented by the first plaintiff in this case. Individual plaintiffs A. FRIEDMAN, H. FRIEDMAN, LEFKOWITZ, LINDER and NOJOVITS would, under this apportionment, be represented in the 57th Assembly District and the 25th Senatorial District; plaintiffs GREENWALD, KLAGSBALD and TEMPLER would be represented in the 56th Assembly District and the 23rd Senatorial District.

26. Application and enforcement of the challenged laws would dilute the value of each plaintiff's franchise by halving its effectiveness. This result, having been secured not by any legitimate legislative process, but entirely to carry out a minimum racial quota in the electoral districts where the plaintiffs reside, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment.

27. Other than the constitutionally impermissible race-conscious purpose described above, there is no rational policy that justifies the segmentation of the Williamsburgh *Hasidic* community as accomplished by the 1974 reapportionment. That action is, therefore, arbitrary and irrational, and violates the plaintiff's right, secured by the Due Process Clause of the Fourteenth Amendment, to be free of totally arbitrary governmental actions.

28. The plaintiffs have, by reason of the actions described above, been assigned to Assembly, Senate and Congressional Districts solely on the basis of their race. This assignment, which results in the dilution of their voting power, abridges their Fifteenth Amendment right to be free of racial discrimination in voting and their similar right under Section 1 of the Voting Rights Act, 42 U.S.C. § 1973, not to have their right to vote abridged or denied "on account of race or color."

29. Pursuant to Section 5 of the Voting Rights Act, the legislation challenged in this action is invalid unless and until "the Attorney General [of the United States] has not interposed an objection [thereto] within sixty days after . . . submission" of the legislation to the Attorney General. Chapters 588, 589, 590 and 591 of New York 1974 Laws were submitted to the defendant ATTORNEY GENERAL on May 31, 1974, with a request that they be given expedited consideration.

30. The full statutory 60-day period was required for consideration by the defendant ATTORNEY GENERAL of the validity of the 1972 reapportionment. As a result of the substantial delay caused by this extended consideration, the authorities of New York State were unable to assert a timely judicial challenge to the determination issued on April 1, 1974. It has now been represented to the defendant ATTORNEY GENERAL, in the letter of submission pursuant to the Voting Rights Act, that expedited consideration is necessary because "the first date for the circulation of designating petitions for this year's primary in New York State will be June 17."

31. Unless this Court issues an injunctive order, the defendant GOVERNOR OF THE STATE OF NEW YORK and his agents, will administer and implement the challenged statutes, even pending a final decision by the defendant ATTORNEY GENERAL on their validity under the Voting Rights Act. Plaintiffs will, consequently, suffer irreparable harm by being prevented from participating in the electoral process in districts to which they should constitutionally have been assigned.

RELIEF

WHEREFORE, plaintiffs pray:

1. That this Court grant a temporary and permanent injunction against the administration and implementation by the defendant GOVERNOR OF THE STATE OF NEW YORK and his

agents of Chapters 588, 589, 590, 591 and 599 of the 1974 New York Laws;

2. That this Court issue a judgment against the ATTORNEY GENERAL OF THE UNITED STATES declaring that the standard under the 1972 New York Laws was unconstitutional and improper;

3. That this Court issue an order declaring that Chapters 588, 589, 590, 591 and 599 of the 1974 New York Laws, enacted on May 29, 1974, are unconstitutional and enjoining the operation of the said laws on the ground of their unconstitutionality;

4. That This Court issue an order enjoining implementation and administration of any apportionment of State Senatorial, State Assembly, and U.S. Congressional Districts in Kings County other than the districts created by Chapters 11, 76, 77 and 78 of 1972 New York Laws or, *alternatively*, those established for the State Legislature by the Judicial Commission appointed by the New York Court of Appeals, and for Congressional Districts by the reapportionment legislation implemented for November 1970;

5. That this Court grant to the plaintiffs their costs and attorneys' fees of this action; and

6. That this Court grant such other and further relief as may be proper in the circumstances.

NATHAN LEWIN

MILLER, CASSIDY, LARROCA & LEWIN

• • • • •

DENNIS RAPPS

• • • • •

Attorneys for Plaintiffs

Exhibit VI

ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Apr. 1, 1974

Mr. George D. Zuckerman
Assistant Attorney General
In Charge of Civil Rights Bureau
State of New York
Two World Trade Center
New York, New York 10047

Dear Mr. Zuckerman:

This is in reference to your submission to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965 of Chapters 11, 76, 77, and 78, New York Laws of 1972, insofar as they relate to the Congressional, Senate and Assembly District Lines in Bronx, New York and Kings Counties. The submission was received by this Department on January 31, 1974.

We have given careful consideration to the submitted changes and the supporting information as well as data compiled by the Bureau of the Census and information and comments from interested parties. Except as noted below, the Attorney General does not object to the implementation of the submitted redistricting legislation. However, on the basis of all the available demographic facts and comments received on these submissions as well as the state's legal burden of proving that the effect of abridging the right to vote because of race or color, we have concluded that the proscribed effect may exist in parts of the plans in Kings and New York Counties.

First, with respect to the Kings County congressional redistricting the lines defining district 12 and surrounding

districts appear to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our own analysis reveals none. More over, it appears that other rational and compact alternative districting could achieve population equality without such an effect.

Similarly, in the Kings County senate and assembly plans, a parallel problem exists. Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist.

In the New York County senate plan, the lines defining district 28 in West Harlem appear to reduce significantly the minority voting strength in that area. Significant portions of minority neighborhoods in that area (district 27 under the prior plan) have been removed to proposed district 29 with apparent dilutive effect. We have been presented with no persuasive justification for this effect and reasonable alternatives appear to be available.

Finally, in the New York County assembly districting, the lines describing districts 70, 71, 72 and 74 appear to have the effect of unnecessarily diluting the voting strength of black and Puerto Rican residents. The result is that district 71 is an oddly shaped district over four miles long with a minority population of approximately 46 per cent.

On the basis of our findings, therefore, we cannot conclude, as we must under the Voting Rights Act, that those portions of these redistricting plans will not have the effect of abridging the right to vote on account of race or color. For that reason I must, on behalf of the Attorney General, interpose an objection to the implementation of the enumerated portions of the submitted plans.

We have reached this conclusion reluctantly because we fully understand the complexities facing the state in designing reapportionment plans to satisfy the needs of the state and its citizens and simultaneously, to comply with the mandate of the federal Constitution and laws. We are persuaded, however, that the Voting Rights Act compels this result.

Of course, Section 5 permits you to seek a declaratory judgment from the District Court for the District of Columbia that this plan neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race. Until such a judgment is rendered by that Court, however, the legal effect of the objection of the Attorney General is to render unenforceable the specified portions of the redistricting plans.

Sincerely,

/s/ J. STANLEY POTTINGER
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74C 877

[Caption omitted]

Notice of Motion for Temporary Restraining Order

SIRS:

PLEASE TAKE NOTICE, on the annexed affidavit of Nathan Lewin, Esq., and the complaint filed herein, the undersigned will move this Court, on June 17, 1974, at 10:00 a.m., or as soon thereafter as counsel can be heard for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, temporarily restraining the implementation of Chapters 588, 589, 590, 591, and 599 of the New York Laws of 1974, pending a hearing on a preliminary injunction before a Three-Judge District impaneled pursuant to 28 U.S.C. § 2281 and for the impanelment of such a Court pursuant to 28 U.S.C. § 2284.

MILLER, CASSIDY, LARROCA & LEWIN

DENNIS RAPPS

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

June 17, 1974

74-C-877

[Caption omitted]

Transcript of Proceedings

[3] THE CLERK: United Jewish Organizations of Williamsburgh vs. Malcolm Wilson, et al.

MR. LEWIN: Your Honor, Mr. Fuchsberg who represents Counselor Wright asked me since he had to go across on an urgent matter, across the street, he asked me to ask if your Honor would please note his appearance on behalf of Counselor Wright, also that he is to appear as *amicus curiae*.

Now, your Honor, I think before——

MR. BONINA: My name is John Anthony Bonina, 16 Court St., Brooklyn. I am appearing for the Kings County Republican County Committee.

MR. LEWIN: My name is Nathan Lewin of 1320 19th St., Northwest, Washington, D.C.

MR. SNAPPER: Your Honor, if it please the Court, if your Honor is not going to transfer this matter back to Judge Stewart's court, if it is going to stay here, then I think we, on behalf of the National Association for the Advancement of Colored People, would intervene on the side of the defendants so that it will be possible for us to protect the interests we are seeking to vindicate in Judge Stewart's court, and we will file appropriate papers in the next day.

[4] THE COURT: Does anyone want to make any statement on that point?

MR. HERZOG: Your Honor, might I note my appearance?

THE COURT: We have enough lawyers in it now. Maybe one more won't do any harm.

MR. HERZOG: I represent Adrian Burke, Corporation Counsel of the City of New York. My name is Irwin Herzog.

MR. ZUCKERMAN: I am George Zuckerman, representing the Attorney General for the State of New York.

MR. SNAPPER: My name is Snapper. I represent the National Association for the Advancement of Colored People.

MR. GIAIMO: I represent the residents of Kings County and am appearing *Amicus Curiae*.

MR. KRAMER: Douglas Kramer, appearing for the United States Attorney General.

MR. LEWIN: I believe this morning, your Honor, before we recessed, you had urged counsel to get together to see whether we could agree on a temporary restraining order that would freeze the status quo at least until such a time as either yourself or a three-judge court, if you decided to seek to impanel [5] one, could consider this proceeding further.

I am sorry to report that we could not agree on the terms of such an order.

The one I had drafted and which I believe was filed with the Clerk and served on the other parties, and I believe also on Mr. Snapper prior to today was an order which would have prevented the Board of Elections from taking any steps such as printing or distributing maps or lines, and would have required notification to everybody that any reapportionment lines were under judicial challenge.

Your Honor, the objection that was made to that order I believe when we recessed and tried to talk was that it might unfairly discriminate against some people who had already obtained copies of maps or lines and would unduly discriminate in their favor against those who had not obtained maps and lines and would not now be able to obtain them.

Instead of that I think we also discussed the proposal of simply freezing everything until this coming Friday because your Honor said we would meet again Thursday morning and therefore we could simply defer until Friday any action on the petitions.

This could be done simply by advancing to June 21, 1974, that is by four days from the present [6] the statute, which says that June 17, 1974 is the first date for valid signatures under petitions and we could simply advance it to June 21, 1974 as the first date for validly signing petitions.

Your Honor, this would be a very short order, it would simply say:

"The first date for signing designating petitions pursuant to the New York Election Law Section 149(2) is advanced, for all election districts located in whole or in part in Kings County, to June 21, 1974."

Now, as I understand, and I think they certainly will speak for themselves, but counsel for the City and the State I believe expressed to me the view that if an order had to be entered during something more than simply saying, Everybody act on his own risk, then that might be a fair order to order, but their view was that they would have to oppose any order being entered beyond one that simply said, "Everybody acts at his own risk."

Of course, it is our position that an order that said, "Everybody acts at his own risk," is a meaningless order.

I would suggest this is the simplest thing to do, that is for these four days, since the signatures [7] on the designating petitions are not valid.

Your Honor, we recognize that it is now 12:30 on the first day on which any such petition could be signed, but we think the word would get out pretty quickly that everything has been frozen until Friday, and that the people who have been working this morning getting petitions will simply, if the Court permits them to go ahead on Friday, simply go ahead and get the petitions on Friday.

THE COURT: We have been unduly lengthy on this whole matter and I would agree on that, June 23rd—

MR. HERZOG: Your Honor, before you rule, the purpose of the temporary restraining order is to protect the status quo, not to change it.

Now counsel here, all of counsel here, with the exception of perhaps Mr. Zuckerman and myself, represent special interests, they may be divergent interests but they are special interests.

I think Mr. Zuckerman and myself represent the rank and file voters in this state and probably all candidates, in this case at least in Kings County which we are speaking about now, and we do not have any particular partisan attitude.

Your Honor, these fellows may agree and maybe it is in their best interest to put this off, but [8] there are thousands of people on the streets today, your Honor, getting signatures, and thousands of voters are signing petitions, and the status quo is that petitions are being circulated.

Now it may very well be that these petitions may not be valid and the lines may not be valid; it also may very well be that these petitions are going to be valid and the lines are going to be valid.

Now, if they are valid, then there is nothing lost, they will be counted, they will be good signatures, and they will be utilized for the designation and nomination of candidates.

If it is invalid and if on the merits of this case the Court says that these are not valid, the lines, what harm would there be to the people and to the candidates, all of the candidates, not particular candidates, to go out and have to solicit new petitions on new lines? Everyone would be equal, they would all have the same opportunity, they would all have the same disadvantages.

What we are doing here is taking a certain group of candidates and giving them this right to say, Wait awhile, we will take a couple of other days, let our adversaries knock themselves out, let them get their petitions, maybe they won't be any good.

[9] Now, I don't want to put anybody in that position, your Honor. I believe everybody should be equal.

MR. BONINA: Your Honor, what the Corporation Counsel is suggesting is that candidates go out with petitions asking people to sign them with the knowledge that they may be bringing on proceedings here to re-draw the lines because they are unconstitutional, and that is inconsistent, that is to ask candidates to go to people to sign something that they themselves don't believe in, and I say that inasmuch as now they are not illegal and not inconsistent.

Your Honor, I represent the Republican Party and quite contrary to the last counsel who had indicated that it is a question of the candidates going out and obtaining signa-

tures that they obtained may be invalid, I am speaking for the Republican Party who last evening to hundreds upon hundreds of workers throughout this county election kits were given out whereby they could go out and get signatures this morning. The Republican Party in this county, and we do not have sufficient workers to cover every Assembly District, but there were a couple of [10] hundred Republicans and these people were out this morning ringing doorbells and getting signatures without any knowledge at all as to what is happening here. As a matter of fact, your Honor, I had no knowledge of this proceeding at all until I received information before Mr. Justice Dadiman, Kings County Supreme Court, to come over here immediately—

THE COURT: You are against the TRO?

MR. BONINA: Yes, your Honor.

The effect of signing that type of a restraining order is to disenfranchise the voters from nominating their candidates at this moment.

In other words, signatures have already been, I would be absolutely certain, that signatures, thousands upon thousands of signature have been collected of enrolled Republicans as well as Democrats and that they have already been put upon designating petitions this morning, and to say to them, while this is going on, Well, the signatures are invalid is to in effect disenfranchise those voters who have already placed their signatures upon designating petitions designating candidates of their choice, and that whether it is for or against what we stand for and believe in, and it is no difference to me whatever it is, whether it is right or wrong, our special [11] interest is that these people have the right to have their candidates.

THE COURT: Very well.

Once, once in awhile I reverse myself. I think I have heard enough pro and con. I will not enter the TRO.

MR. BONINA: Thank you, your Honor.

MR. GIAIMO: Your Honor—

THE COURT: I have heard enough.

MR. LEWIN: Your Honor—

THE COURT: I know that people are dissatisfied about rulings, but that is my ruling.

MR. LEWIN: Might I, your Honor?

Your Honor, just one moment, please, because I think there has been just a mistake in an assertion as to what the consequences of this is.

As I tried to point out to your Honor, the law at the present time is not valid. The law is not on the books of New York States.

My colleague here has said we are disfranchised from going out and signing petitions. That is not true. What we are saying is and what is entirely clear is that this law, until the Attorney General acts upon it, is totally invalid—

THE COURT: I am going to go into the issues [12] later. We will have that to consider, but I have heard enough now, counselor. I have your point.

MR. GIAIMO: Your Honor, may I say this? May we advance this to 10:00 o'clock on Thursday?

THE COURT: I again request counsel to submit their memoranda on this item of a three-judge court by noon tomorrow.

MR. GIAIMO: Can we advance the date of the hearing then? Can we move it up to Wednesday?

THE COURT: I will reserve decision on that.

MR. LEWIN: Your Honor, your Honor—

(Judge Bruchhausen then left the bench.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 C 877

[Caption omitted]

Transcript of Proceedings

United States Courthouse
Brooklyn, New York

June 20, 1974

BEFORE:

HONORABLE WALTER BRUCHHAUSEN, U.S.D.J.

* * * * *

[3] THE CLERK: United Jewish Organizations of Williamsburg, et al, versus Malcolm Wilson and others.

THE COURT: I regret the delay. I try to avoid the old adage of "hurry up and wait." But we do have emergency problems in chambers. Sometimes the public does not think that the Court is operating when there is no one in the courtroom. But as the lawyers understand, a great deal is consummated in chambers.

Oh, I may say at this point that so much of the plaintiffs' motion as seeks the impanelment of the three-judge court is denied. And a memorandum and order will be filed.

So you may proceed, gentlemen.

MR. SCHNAPPER: Your Honor, before we get to the merits of the controversy, we have a pending motion to intervene on behalf of the NAACP of New York City.

The District lines, which are being challenged here, are district lines which we succeeded in forcing the legislature to enact this year, as the result of seven years of litigation. And this particular action is essentially an attack on the [4] outcome of litigation in which we have been engaged

in for several years. To protect the judgments which we have already obtained and relief which we have won, not only from the courts, but the attorney general and the legislature, we would ask for permission to be permitted to intervene as party defendants in this action. We raised that matter before. I think the parties indicated that they had no opposition to that.

THE COURT: Well, I have been through these situations a great many times. I think you may come in as amicus curiae. I think that will protect your interests. You will be allowed to submit whatever you think appropriate.

MR. SCHNAPPER: Would your Honor's order in that regard include the possibility of examining? I think there would be one witness today.

THE COURT: You say what?

MR. SCHNAPPER: I think there will be one witness today. We would like the Court's leave to examine that witness so that appears to be appropriate at that time.

THE COURT: Well, I will acquiesce in that.

MR. SCHNAPPER: All right; that will be [5] perfectly fine.

MR. LEWIN: Your Honor, may I say in that regard, too, that in the hearing, we held on Monday, there were other attorneys who appeared and that at that point requested leave to intervene, I believe.

There has been a Mr. Giaimo, who asked leave to intervene on behalf of the Polish and Italian communities. I do not see him here today.

But if the proceeding were in any way to continue beyond today or at some future hearing, I trust that whatever rule your Honor applies to the amicus curiae, who are appearing in support of the defendants who also apply to the amicus curiae or amici on behalf of the plaintiffs.

THE COURT: Yes, I so rule.

MR. LEWIN: Thank you, your Honor.

Well, then, just for the purposes of the record, if I might, on behalf of the plaintiffs I would note an exception to your Honor's refusal to impanel a three-judge district court.

If I might also state for the record, that we were in some slight uncertainty, but because of the time factors and otherwise, as to exactly how to proceed today. However, in the light of your [6] Honor's ruling, that you would not impanel the three-judge court, we would now like to proceed to seek a preliminary injunction and move for a preliminary injunction directed not to the same matter that we had raised on Monday, which is the matter of circulation of petitions or distribution of petitions, but directed instead to the question of whether relief should be granted with regard to the 1974 reapportionment lines in time to affect the coming primary and election in November of this year.

And in that regard, I think it is our burden as plaintiffs to establish, one, the likelihood of succeeding on the merits and, two, the irreparability of harm if relief were not granted.

And for that purpose, I think it would be appropriate for us just to call a few witnesses to be heard today on that subject, because we think it would be proper for this court to enter a preliminary injunction that would enjoin the use of these 1974 lines, at least insofar as it affects this group of plaintiffs, in time for the 1974 primary and election.

The broader constitutional issues, of course, are of great magnitude. And we are prepared [7] to argue them for that purpose today. But if the Court determines that it should proceed ultimately to a trial on the merits, then of course the question would be, what happens in the meantime. And so far as what happens in the meantime goes, it is our view that for this year, 1974 reapportionment is invalid and may not be applied, both because it is invalid under the Voting Rights Act, and it is unconstitutional, and if it were applied as to these plaintiffs, it would cause them peculiar irreparable harm.

And on that basis, your Honor, we have just a very short paper that we can file, which is a motion for preliminary injunction—

THE COURT: Well, you have already in your original motion added an application for a preliminary injunction. That is in the motion papers.

MR. LEWIN: All right. If it is unnecessary to file it—

THE COURT: The statement and your notice of motion is and for the—no—well, pending hearing on the preliminary injunction—well, I assumed that that was included in this application.

MR. LEWIN: Well, just for formal purposes, your Honor, it is a page and a half, and we simply [8] say we move for preliminary injunction. If I could just file that—I do not think it says anything more than what I have said orally. But having filed that, I would like to call witnesses in support of that motion.

THE COURT: You may so proceed.

MR. LEWIN: I call Rabbi Albert Friedman.

THE CLERK: Will you face the Court and raise your right hand?

MR. LEWIN: I think he will affirm.

THE COURT: You do solemnly swear to tell the truth—

MR. LEWIN: I believe he will affirm.

THE COURT: Oh, he will affirm.

MR. LEWIN: Your Honor, could we have Mr. Fred Richmond instead, at this point? I think he would like to go back, anyway.

[9]

Frederick W. Richmond

called as a witness, having been first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIN:

Q. Mr. Richmond, can you please state your occupation?

[10]

DIRECT EXAMINATION

BY MR. LEWIN (continued)

Q. Mr. Richmond, can you please state your occupation?

A. I am City Councilman of the 29th councilmanic district in Brooklyn.

Q. That district that you are a councilman from, does it encompass the district that is involved in the present litigation? A. Yes, sir.

Q. That is the area is Williamsburg where the Hasidic community resides? A. Yes, sir.

Q. How long have you represented that district? A. Two years.

Q. Prior to that time, were you familiar with the residents of that district? A. Yes.

Q. In, specifically, have you been familiar for a period of time with the Hasidic community of Williamsburg? A. Yes, I have been familiar with them for seven years.

Q. And have you in this period of time also been familiar with such political activity as they engage in? [11] A. Yes, sir.

Q. Have you formed in that regard any conclusions with regard to the willingness of that community to participate in political activity? A. Yes. I find the residents of the Hasidic community to be very aware, politically; ready to do their duty as citizens; ready to vote; very, very much interested in the affairs of New York City and the plans of their community.

Q. Is this a recent development? A. I have seen them growing during the whole seven years that I have worked with the Hasidic community. But even when I first came there, I noted a pronounced interest in community life, Brooklyn life and New York City.

Q. What, in your opinion, would be the effect on that community of the assembly and senate districts being split?

MR. HERZOG: I object. I think the question is irrelevant. It doesn't go to the essence of this issue at all. You might ask that question about any district anywhere.

MR. LEWIN: I think, your Honor, it goes to whether there is peculiar, irreparable harm to this community, regarding it being split, and if the [12] councilman from that district knows that there would be a peculiar harm to the residents of that district, then I think it very much goes to the question of whether there is some particular irreparability of there were a single election.

THE COURT: Well, I would take it subject to a motion to strike later on.

MR. LEWIN: May we have the question.

(Record read)

THE WITNESS: I believe it would break up a very viable, healthy, growing constructive community.

I believe it would materially hurt the people living in that community.

I believe the split is unnecessary, unusual, and would definitely destroy a cohesive neighborhood.

BY MR. LEWIN:

Q. What about efforts in that community to register voters? Would it some way distort those efforts? A. It would certainly deter them from voting as a group, as a single neighborhood, and I know the General Voting Act looks towards building neighborhoods. We in New York City feel very much for our neighborhoods. Williamsburg is definitely a single neighborhood and should be treated that way.

[13] Q. The lines that are drawn are I think drawn substantially along the lines of the Brooklyn-Queens Expressway. Is that area a natural boundary for that district? A. No, I think Mr. Robert Moses, Brooklyn Queens Expressway makes no natural boundary whatsoever. All it did was create a Chinese wall through the neighborhood. But the

Hasidic community has succeeded in living on both sides of the Chinese wall, and still created the neighborhood.

Q. In your view, would the harm to the Hasidic community from going through a single election split with the line down the Brooklyn Queens Expressway be greater in that community than it would be in any other community that would happen to be split artificially?

MR. SCHNAPPER: I would object. I think it is getting fairly speculative at this point.

THE COURT: Well, I will take it, as I say, subject to a motion to strike.

BY MR. LEWIN:

Q. Is there any peculiar harm—let me rephrase it—Is there only peculiar harm in a Hasidic community from going to a single election in which they would be split, than might not be true as to some other community that might happen to be split, for just one election? A. I believe when you realize that the Hasidic [14] community of Williamsburg is one of the most unique communities in New York City, one of the best communities, one of the finest communities in the City of New York to run, inasmuch as they use no school funds, no welfare funds, and run very low on hospital funds, I believe it is incumbent on all of us to do everything we possibly can to keep them as a cohesive happy community, working together.

Now splitting them, even for one election, I think, would be harmful.

MR. LEWIN: That is all.

CROSS-EXAMINATION

BY MR. ZUCKERMAN:

Q. Councilman Richmond, are you aware of the fact that the County of Kings by virtue of the fact that it is presently subject to the Federal Voting Rights Act, that requires that all reapportionment plans must be submitted to the Department of Justice for its approval? A. Yes.

Q. Now, at the time that the 1972 lines were submitted to the Department of Justice, and I remind you that the '72 lines preserved Williamsburg in one senate and one assembly district, did you as an interested observer of the political community write to the Department of Justice and ask them to rule in favor of those '72 lines? [15] A. I personally didn't write, no.

Q. Have you written or otherwise contacted the Department of Justice with regard to their present consideration of the 1974 reapportionment lines? A. Yes, sir.

Q. You have asked them, I take it, to try to preserve Williamsburg? A. I have asked them to try to preserve Williamsburg and other communities which have been wantonly destroyed.

Q. What other communities do you regard as having been wantonly destroyed? A. I consider the community of Green Point to have been wantonly destroyed, too, and—

Q. Would you have any idea as to how many communities there are that are recognized in the County of Kings? A. That is subject to anyone's calculations. Certainly we have 50 to 60 clearly-defined communities in the County of Kings.

And I think it is incumbent upon every politician and every community leader to do all that we possibly can to foster community life.

Q. Do you recognize the fact that there are only [15a] eight full senate districts in Kings County plus part of two others? A. Yes.

MR. ZUCKERMAN: I have no further questions.

[16] CROSS-EXAMINATION

BY MR. SCHNAPPER:

Q. Mr. Richmond, you indicated at the residents of this particular community are interested in community affairs and anxious and willing to vote.

Is that a trait which is limited to white adults of voting age, or are there blacks of voting age interested in community affairs, willing to vote and to—— A. Certainly.

Q. Among the whites, is this characteristic limited to Hasidic Jews, or are there other whites who are also interested in this? A. I believe throughout Brooklyn we have many neighborhoods and many communities who are desperately anxious to stay together, to build, and to vote.

Q. Are there black or Puerto Rico communities which meet that description? A. I would say so.

Q. Would you say that the splitting of these communities would also have an adverse effect on the residents of those black and Puerto Rican communities? A. Absolutely.

Q. Is that in your judgment less important than in splitting the Hasidic Jewish community, or is it [17] equally important? A. I believe it is equally important to foster and build every bit of neighborhood feeling and community feeling that you can possibly produce in the City of New York today. You have got to put New York City back to its neighborhoods, back to the essence of living in New York City. And I believe, in order to do that, we have got to do everything possible to foster our neighborhoods wherever we have a community, whether it is black, white or Hasidic or any other type of ethnic group where it is a clearly defined community. I believe that a community should be preserved the way we preserve important buildings, the way we preserve parks.

It is even more important to preserve people.

Q. Now, I take that under the new districting, that is, under the question here, the Hasidic council lines have not been changed; is that correct? A. Right.

Q. So that even—even if these particular lines are held, the entire Hasidic community would be in the same councilmanic district? A. Right.

Q. Now, are you familiar with the new congressional [18] lines? A. Yes, sir.

Q. And entire Hasidic community would be in the same congressional district? A. Yes, sir.

Q. So that for the purposes of the question here, the Hasidic community is in the same district, and for the purpose of others, it is in a different district? A. Yes.

Q. Is it your testimony or—that if—with regard to the senate, or senate districts, that because of the splitting, an assemblyman might represent only part of the Hasidic community, and would refuse to represent or consider the interests of the Hasidic constituents? A. No, I do not believe that is the case, but I believe the district is so clearly a cohesive neighborhood that it rightfully belongs in one single assembly district so that the one single assembly man can spend a good deal of time learning what the problems of that community are and working with the community leaders from that community, and representing them in Albany, to the best of his ability.

MR. SCHNAPPER: Okay. That is all. Thank you.

THE COURT: Any other questions?

[19] MR. BONINA: May I inquire for a moment, your Honor?

MR. LEWIN: Did you apply for leave to question——

MR. BONINA: As amicus curiae.

Just a few questions not on the merits.

THE COURT: I will allow it, yes.

CROSS-EXAMINATION

By MR. BONINA:

Q. Councilman, when did you first become elected to the City Council? A. I was appointed to fill a vacancy two years ago, and I won my first election about a year ago.

Q. Now, as councilman, there are councilmanic lines, are there not? A. Yes.

Q. And in 1973, were the councilmanic lines challenged in a State court, as unfavorable to the fact of gerrymandering? A. I do not recall.

Q. Well, ordinarily you would serve four years, would you not? A. Yes.

Q. You were on last year? [20] A. Yes.

Q. Are you required to run again this year? A. Right. Yes, you are quite right. The lines were changed somewhat.

Q. And are you aware of the decision of the Court of Appeals in that particular case of our state? A. By the fact that we are running again this year, it would appear to me that the decision of the Court of Appeals indicated that there had to be a new election.

Q. Would it be a fair statement that the decision of the Court of Appeals in that case was that the original councilmanic lines were unconstitutional and that for the purposes of a following election in 1973, you were to run from those lines, and then there was a direction to have new lines drawn for the purposes of 1974? Is that fair and accurate statements?

MR. LEWIN: Objection. I think the witness has testified he doesn't know about that lawsuit. I don't know why Mr. Bonina is interrogating about a lawsuit that he doesn't know about.

MR. SCHNAPPER: If there is a decision, certainly he can submit that decision—

THE COURT: And you are questioning, I take it, as to the substance of the lawsuit?

[21] MR. BONINA: No, your Honor, I am questioning him as to the ruling of the Court of Appeals of the State of New York, having found lines to be unconstitutional and allowing the councilmen to run from those unconstitutional lines for the purpose of one election so that there would be order, and thereafter directing that the lines be drawn for the next ensuing election, and ordering further that the public officials run again the following year, even though their term of office would have been for period of greater than one year.

That is all I choose to ask. Thank you.

THE COURT: Where do you live, Councilman?

THE WITNESS: 43 Pierrepont Street in Brooklyn Heights.

MR. MCGOVERN: Your Honor, the Conservative Party of Kings County would like to ask a few questions in support of the plaintiff's rights.

THE COURT: Yes.

MR. MCGOVERN: My name is Kevin Patrick McGovern for the Conservative Party of Kings County.

BY MR. MCGOVERN:

Q. Now, Mr. Richmond, Mr. Bonina used the term, gerrymandering. Will you tell us what it means? [22] A. I think the word, gerrymander, means redistricting without taking into account the ethnic groupings, the neighborhood groupings, the community groupings of the community who live in the district.

Q. Is it not one of the function of gerrymandering to deny a certain group of voters their effective franchise? A. Absolutely.

MR. MCGOVERN: Thank you.

MR. LEWIN: I have no further questions of this witness, your Honor.

THE COURT: Any further questions of this witness?

(There was no response)

THE COURT: All right, you may withdraw.

(Witness excused)

MR. LEWIN: I think it might be useful for the record to reflect, your Honor, that Mr. Schnapper, when he applied for leave to intervene, and your [23] Honor gave him authority to appear as amicus curiae, applied for leave to intervene on the side of the defendant. I think Mr. Bonina is sitting at our table, and Mr. McGovern is sitting at our table, and I would like to have on the record just a statement from them that they are on the side of the plaintiff on the merits, if that is correct.

MR. MCGOVERN: The Conservative Party of Kings County is appearing on behalf of the plaintiffs in support of their position, your Honor.

MR. BONINA: The Republican Party of Kings County is in favor of the petition brought by the petitioners, your Honor, as indicated, with modification of the relief request by counsel for the petitioners this morning, that the signatures are the remaining valid throughout the County of Kings, and hopefully, as I tried to point out, respectfully, to the Court, that the lines would remain valid for one election.

And then assuming that the petitioners are right on the cause of action—assuming that the plaintiffs in their petition are correct on the merits—and the Kings County Republican Party feels that they are correct—assuming that that is so, [24] that these lines I would then be formed for a future election, but that for the purpose, to avoid chaos, that the lines remain as they are for this particular year.

That is the position of the Kings County Republican Party. We join with them on the merits. But to avoid chaos, your Honor, in the current election we maintain a position that the lines must be held for this particular year.

THE COURT: You say that the present lines before the injunction of the 1974 statute should be preserved for this year.

MR. BONINA: For the one election, your Honor, assuming that there is merit to the petitioner's cause of action, and we feel there is merit to their cause of action, your Honor, that should not be held to effect this year's election, which would in effect deprive the individuals of their right to vote and be elected from certain lines.

We join with them in the particular application. And if there is a direction from this Court in their favor to redraw the lines, we would hope that for this particular year's election, that they remain, and for the following years, they be kept [25] as a cohesive group. They are a cohesive group, we believe. And we believe there is merit to their cause of action.

MR. LEWIN: If I understand your statement—

THE COURT: What is your position as representing the plaintiff?

What is your position?

[26] MR. LEWIN: Well, our position representing the plaintiff is that the lines as they appear and have been drawn for 1974 are unconstitutional and illegal, and as Mr. Bonina says they are—I think that is his position.

THE COURT: In other words, you don't go along with your friend here on continuing them for this year.

MR. LEWIN: Yes, that is right. In other words, we think if they are illegal there is plenty of time for this year to make those lines for this year. I mean if Mr. Bonina says they are illegal we say that with regard to this community certainly there is reason to correct them for this year as well.

MR. MCGOVERN: Your Honor, the Conservative Party agrees with the plaintiffs completely. We feel that the loss of the elective franchise for one many in one election is intolerable. The loss of the elective franchise for an entire community even in one election is tantamount to tyranny, Your Honor.

MR. LEWIN: All right, at this point, Your Honor, I call Rabbi Friedman.

Rabbi Albert Friedman

having been first affirmed by the Court, to tell the truth, took the stand and testified as follows:

[27] DIRECT EXAMINATION

BY MR. LEWIN:

Q. Now, Rabbi Friedman, you are a plaintiff in this case?

A. That is correct.

Q. And with what organization are you affiliated with?

A. I am affiliated with the United Jewish Organization of Williamsburgh.

Q. Which is also the plaintiff? A. Right. I am also Vice Chairman of the Williamsburgh Community Corporation, which is a community corporation elected by the residents

of Williamsburgh representing all segments of the Williamsburgh population, white, black, Puerto Rican, Polish, Italian, and everything else.

Q. Could you describe what are the United Jewish Organizations of Williamsburgh is? A. The United Jewish Organizations of Williamsburgh is an umbrella organization encompassing all community and social organizations which serve the Jewish people in Williamsburgh. And they are also engaged in teaching the people to help them in their electoral process and register them to vote, and also involved in benefitting the community with various housing projects, non-discriminatory integrated projects.

[28] In short, the United Jewish Organizations of Williamsburgh is involved in everything that goes on in Williamsburgh.

Q. Now, have you personally been involved in the efforts that have been made with regard to political activity? A. Yes, I have personally been involved since my earliest youth, since my father the late Leopold Friedman, was one of the principal community leaders in the Hassidic community, especially in Williamsburgh, so naturally whether I had a choice or not I think I was involved in everything in Williamsburgh politically.

I am also involved in voter registration. I am deputized by the Board of Elections to conduct voter registration. I have been also deputized this year and last year. And every time the voluntary registrations have been set in motion by the Board of Elections I have always been there, among the first people to be deputized to go out and register people in the community.

Q. Would you describe the attitude of the Hassidic community in Williamsburgh towards the matter of voting or participating in political activity? Would you describe that historically?

A. Well, historically Hassidic Jews originated from Europe. In Europe there is no such thing as a democracy. Elections are not something which people participate in in

Europe, especially in Eastern European countries. So this [29] whole concept of participating in the democratic process of elections was an alien thought to many Hassidim.

After when they came to America and when they were involved in the system here in the United States one of the principal duties of citizenship is to participate in the elective process. To vote for people. And especially in communities like Williamsburgh where we had to turn to various political leaders and representatives to help us, we saw it incumbent upon us to make sure that everybody does benefit from that franchise and does participate and does go out to vote.

[30] Q. Historically, is the Hassidic community of Williamsburgh substantially composed of people who were refugees from the Second World War? A. I would say that about 90 percent of the people who were not born in America, who emigrated to America from Europe are concentration camp refugees, however, the young generation, me included, were born in America.

Q. In connection with the discussion had off the record, has the concentration camp refugee experience made the community skeptical of the outside world? A. The refugee experience, the concentration camp experience has affected the community as being very much—what was that word you used?

Q. Skeptical. A. I would even use a stronger word than that. It would be some sort of a mistrust, afraid of the outside people.

Q. Has it taken very strong affirmative efforts on your part and others to get them out to vote? A. It has taken all we could do to have them participate in the system.

Q. As of this moment, is it your view that that effort is in some way succeeding? A. It has been very successful until these new [31] lines, until this year, until this thing started.

It has been very successful. They have been participating. The elective representatives have been responsive to

us, and as well as to other groups, and we were benefiting from the democracy until this thing came up.

Q. What would you view be of the affect of even a single election with the present state of the assembly line? A. Devastating.

Q. In what way? A. It is hard for people to be convinced that they are supposed to be part of the system, that the system will welcome them into this system.

When they see a direct slap in the face as these lines, which nobody is satisfied with, we as a community who represents everybody, they introduced a resolution opposing implementation of these lines, and I think a copy was sent to the Court and the Department of Justice; so everybody feels that the community was given a slap in the face by some line makers.

Last week there was councilmanic reapportion indicated earlier and at that time there were public hearings and people had a chance to speak out.

The City Council tried twice to draw up new lines and again there was a chance for the public to be [32] involved in that.

When the second lines were overturned by the Court, then it was, I think it was in October or November, and the petitions were already in and that is when they decided to make new lines for next year, for this year for councilmanic purposes.

Q. Were you hurt by these lines? A. Yes. We were definitely hurt by these new lines.

Q. I am sorry, were you heard as far as your views with respect to the 1974 lines? A. No. We first found out about this thing when the letter came from the Attorney General on April 1.

It just came from the State, Mr. Zuckerman, disallowing the 1972 lines as unconstitutional.

At that time we contacted counsel to see if there was anything we could do to protect ourselves.

Counsel told us the State is going to Court and they are the ones who are to fight this thing.

There was a law suit initiated by several legislators at that time against this ruling by the Department of Justice.

The fact that the Justice Department took 60 days to disallow the old lines of April 1, this did not allow us much time to participate.

[33] We tried everything to be heard, that we were dissatisfied with their ruling.

At that time we were not a party to this case. When the Senate called a special session to draw new lines we again tried and we assumed, which was the usual procedure for the committee, to hold hearings to speak out on this matter, however, our State Senator who was a member of the reapportionment committee, told us we were assured that we would be heard.

When we found out about these lines that were detrimental to us, it was Friday afternoon and at that time we sent off telegrams to everybody we could think of asking to be heard.

Sunday morning about noon we saw the new lines, that they were hurting us. Monday and Tuesday was a Jewish holiday, May 27 and May 28, it was Shavuot, and because of our religious belief we could not do anything on Monday and Tuesday. It was our constitutional right to practice our religion the way we wanted to.

Wednesday morning the Senate was in session voting on these lines.

THE COURT: This is later in May?

THE WITNESS: Yes, May 29.

That day they approved the new lines.

[34] of intervention that we could think of.

I didn't go to Albany because I felt in Brooklyn we could get across to people better than in Albany.

We had our district leader in touch with us. We tried to get in touch with the county leaders.

We used every way to try to voice our objection to it. Subsequently, we found out they were considering amendments and that certain people realized there was an injustice to us. They tried to make an amendment but didn't. The Assembly and Senate adjourned on the 30th without giving us relief.

At that time we waited to see the new lines. As soon as possible thereafter we contacted legal counsel to see justice was done to us.

After, the lines were drafted suddenly and without notice and passed by the legislature.

Q. If they were used for this coming year, what affect would it have on the Hasedic community? A. The voting drive has stalled because of this.

People are saying that the registration drive, that is, people are saying we feel they don't care for us and if we were one of the first Jewish communities active and to be broadminded, we are not to back just people because they [35] are Jews. We are to back people who are responsive to us. In the last primary we backed an Irish Catholic.

Q. In terms as to affect, as to the registration drive, would you please tell us about that? A. The people felt they were being alienated.

Q. Is the original skepticism coming out again? A. Yes, much stronger because the younger generation, they do not know the European experience firsthand, but they feel they are getting a taste of the same thing themselves.

Q. You mentioned the past pattern of support for candidates running from that area. A. Right.

Q. Has there been in your view any racial pattern, racial or religious pattern of voting? A. Definitely not.

Q. Has the Hasedic community voted and supported a minority race candidate? A. Yes.

Q. Give us an instance. A. I will go back to the last primary in 1972. The last primary based on the lines under discussion at that time the candidates for the Congress-

sional district were Alan Lowenstein, a Jew, Irving Gross, a Jew and John J. Rooney.

The Hasedic community came out in full support [36] for John J. Rooney.

At that time there was a primary for co-district leader, Mildred Marchiano, a white woman and a Mrs. Martinez.

The Hasedic community voted for the Puerto Rican. Those two had to have a rerun because the Court of Appeals nullified the election and there again the Hasedic community voted for John J. Rooney and they voted for Theodora Martinez, the Puerto Rican.

If you go back to other races, our attitude was to support people regardless of race, color or creed.

Roy Wilkins, leader of the NAACP, his column in the Post mentioned this fact after that primary. He mentioned how the Hasedic community backed John J. Rooney again over Lowenstein and backed a black candidate.

He mentioned how the Hasedic community was broad enough to go for the candidates fair minded to all. He instructed the NAACP and all black leaders to take into cognizance of this fact that a person can be represented.

Q. During your testimony with Mr. Schnapper, he asked about the Hasedic community, whether it is still unified in the councilmanic and proposed Congressional district.

Is that in your view adequate representation for the Hasedic community as a unit? [37] A. Definitely not.

First of all I would like to take exception to the previous assumption because in the councilmanic district there are some Jews out of the district. However, we feel, my opinion is, you cannot give us half of the Constitution.

We are full citizens and are entitled to everything. If we vote for a Congressman and a State Senator and a Councilman and everything else, we should benefit and be able to vote for everybody in the same manner and not just give us half a pie and give us one community and take it away from the other districts.

Q. Have there been particular concerns in the Hasedic community that you have only the lines for the State Assemblymen and the State Senators? A. Definitely, the Congressman, they are most effective in helping us in Federal areas and councilman is effective in helping us in City registration, however, the State supersedes the City.

The State Assemblyman and the State Senator is the person we turn to who will try to help us in our needs in the community.

Q. The Department of Justice letter which invalidated the '72 reapportionment in part spoke about the fact that the minority race communities were concentrated [38] in neighboring assembly districts to your own.

Do you know the percentage of the minority race population, what it was in the 57th Assembly District prior to 1974? A. Yes, the 1972 lines gave us a minority percentage of more than 60 percent.

Q. Are you objecting or are the plaintiffs in this case objecting to being in a district that is more than half minority race? A. No.

Q. And if fact you were, prior to the 1974 lines? A. We were 60 percent minority district until now and we definitely do not object to that.

Q. You talked about previously the fact that the Hasedic community does not vote on racial lines.

Does it vote on particular party lines? A. No, if it is all right with the Court, I can list who we backed: In 1972 we backed Nixon against McGovern. In 1972 we participated in the Republic district leadership fight.

Some insurgent, Robert Fenn, and Marie Terrabasso, they had a primary against the incumbent leader who was Mike Chiasano and Maria Terrabasso.

Mike Chiasano did not seek our support and [39] Marie Terrabasso did.

She felt the Jewish community should have representatives in the County committee and we accepted that.

For the first time there were Hasedic Jews on the Republican County Committee, and we won.

We also have a Conservative party who is an Hasedic Jew who is a complainant in this case.

In 1972 we backed Richard Nixon.

In 1968, at that time we backed Humphrey. We backed the Kennedys and we backed Rockefeller. Both Buckley and Hodell had more votes than Mr. Ottinger.

Q. You backed Democrats as well. A. Sometimes we did.

In major races we backed more Republicans than Democrats over the years.

MR. LEWIN: That is all I have.

CROSS EXAMINATION

BY MR. ZUCKERMAN:

Q. You say you are aware of the Pottinger ruling of April 1, 1974? A. Yes.

Q. From that time until the end of May, did you or your organizations make and attempt to contact the New York joint legislative committee on apportionment? [39a] A. Yes, We contacted our Senator, Senator Chester Straub, our State Senator, a member of that committee.

[40] BY MR. ZUCKERMAN:

Q. And do you know what Senator Straub did? A. He told us afterwards everything was done and did not have a single chance.

His district was also cut into pieces.

Q. That is hearsay—

MR. LEWIN: Counsel has asked for hearsay and he got it.

Q. What did you do individually? A. We contacted Senator Straub to voice our objections to it and also our attorney, Abrahm Gurgis and Joseph Slaven had a case in Washington and he also fought the Pattinger ruling.

I was getting in touch with you but you were sitting shiva at that time.

In other words, we tried to do everything we could.

Q. How large would you estimate the Hassidic community is in Williamsburgh? A. Based on the census track, I would say the wide community, we never did an accurate count, but based on the census track there are about 35,000 white people in the Hassidic area of which 80 to 90 percent would be Hassidic.

Q. Now, you have testified as to how the Hassidic [41] community voted in prior elections.

Are you implying they voted 100 percent for individual candidates? A. The election process is secret, so that I could not state how anybody voted.

Analyzing the returns we see our endorsements are favorable to the community.

Q. You are talking in terms of majority of Hassidim? A. Right, that majority.

CROSS EXAMINATION

By Mr. SCHNAPPER:

Q. I believe you testified in response to Mr. Lewin's question that you did not have any objection or did any of your organizations which you remember to being in a community which happened to have a non-white majority? A. I testified that we are right now in a district which has a non-white majority and we do not object to those lines.

Q. What you do object to is being split between districts? A. Basically we object to being split, correct.

Q. I take it then if you were in a district which was, you said the present 57 is 60 percent non-white.

[42] If you were in a district which was 75 or 70 percent non-white you would not object as long as you were in the same district all together? A. If we were kept together without cutting us up we wouldn't play the percentage game.

Q. I call your attention to the new Congressional lines. It is my understanding the new Congressional lines are about 75 percent non-white, the new 14 Congressional district which you are in? A. Yes.

Q. You are in the same district in that regard? A. I take exception to that because Councilman Wright indicated we are only 60 percent non-white. Let us not play numbers. It is majority non-white.

Q. If it was 75 percent non-white you would not mind? A. We wouldn't mind, being in the same district if it is a majority non-white, however, that has to be challenged. We are complaining about the Congressional lines because that was illegal and unconstitutional. That is also mentioned in the complaint.

Q. I am not bouting your opinion and if you were a lawyer I am sure you would be an excellent one. What hurts your community is being in different districts? [43] A. We are being gerrymandered and cut in half. If we are in one community that is true. We are complaining against everything at this time because everything was illegal.

Q. With regard to your efforts to get people to register and vote, I take it your efforts have been successful there? A. Yes.

Q. Do you have any idea what the level of voter registration is in the Hassidic community? A. I would still say it would be probably, I would think it would be less than 50 percent but I could not give you exact figures. I cannot play the game of numbers.

My judgment is there is still a lot to be desired. We have a lot of 18 year olds, some people turning 18 year old and then we have other people for some reason or another moved and skipped elections. You will find percentages all along those groups.

We do have a large number who still have to be registered for reasons beyond their control or otherwise.

Q. I take it you indicated you were now having problems persuading people to register? A. Yes.

People are reluctant to register.

[44] Q. Am I correct in understanding that the reason for that is because you are now split in senate lines? A. The reason is things were done against us, so what is the basis for voting and more specifically that cutting in half plays a major role in lack of people's participating.

Q. Feeling their votes would mean less because in an upcoming election their votes would be split? A. Our votes mean nothing because powers are doing things without thinking of us.

Q. You indicated that you felt you hadn't been heard on the 1974 redistricting process? A. That is correct.

Q. Do you have any information to lead you to believe there were hearings in which other people were heard, that you were somehow excluded from or there were no hearings for anybody? A. The only hearing I know of is the NAACP filed and I cannot answer that.

Q. There was no one preventing you from filing a plan? A. I cannot answer that. I don't know what the process was. We expected a public hearing.

Q. There were no public hearings at all? [45] A. No, and no chance for a valid input.

Q. It was not a question where there were public hearings where only blacks could testify? A. No, there are more blacks and Puerto Ricans on that Board of Directors and they also felt they had no chance. Everybody is upset over these lines.

Q. With regard to your mentioning the plans being submitted to the joint legislative reapportionment committee, you didn't go to the Post Office and they turned you back? A. I personally——

MR. LEWIN: We will stipulate there is no plan submitted. That is what the witness testified. There is no reason to ridicule the witness with this type of questioning.

MR. SCHNAPPER: I am sorry. I did not think we had it for the record.

Q. You indicated you felt it was important for the Hassidic community to have members of the Senate and Assembly responsive to your concerns and needs.

That is why you are concerned about your redistricting; is that correct? A. Who would respond to us, recognize us as a part of his district. That is correct.

Q. Do you think your need, that the blacks or [46] Puerto Ricans do not have the same need? A. They definitely have the same need.

Q. Your need is not important, not more important than theirs? We are all American citizens? A. Every citizen is entitled to that need.

People are underprivileged and deprived and if they are a community then it hurts more there.

Q. But if blacks—— A. They should also have a chance for representation.

Q. Are the Hassidim in Williamsburgh the only ones in Brooklyn? A. No, Boro Park and Crown Heights.

Q. Those are the main other communities? A. Williamsburgh is the largest.

Q. There are two other large communities, one in Crown Heights and one in Boro Park? A. Yes.

Q. You are not objecting to the fact that you are not in the same district with those Hassidic Jews? A. We are. We go down as far as Eastern Parkway. We don't ask to have everything turned around to our liking, but we want reasons to prevail.

Q. You are not in the same district as the Hassidic [47] community in Boro Park? A. No, that would not be possible.

MR. SCHNAPPER: That is all.

REDIRECT EXAMINATION

BY MR. LEWIN:

Q. In answer to Mr. Schnapper you said that there was still less than 50 percent of the Hassidic Jews in Williamsburgh registered.

I think you said that was due to a variety of reasons.

One of the reasons I don't think you mentioned, that it also is a fact, that there are still a very substantial number of Hassidic Jews in Williamsburgh who are reluctant and isolated and therefore not ready to register? A. Yes, I am sorry I did not answer that.

Many people have the European syndrome, the concentration camp syndrome they all have and this effects them and all this is heightened by this slap in the face.

Q. Would that be cured in any way by your district being put together the following year? A. The harm done this year would be irreparable.

[48] THE COURT: Yes.

MR. LEWIN: Your Honor, are we finished with Rabbi Friedman? There may be people out in the hall.

MR. BONINA: Excuse me for being late.

THE COURT: You may proceed, counselor.

MR. BONINA: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. BONINA:

Q. Rabbi, to go over your testimony very briefly, the Hassidic community is located solely within the Congressional District, is it not; in other words, the Congressional District—the 14th Congressional District does not exclude the Hassidim? A. No, it does not exclude them.

Q. In that respect the object of the Hassidic community is to remain as a cohesive unit insofar as the 14th Congressional District is concerned; is that right? A. To be together, they are all in the 14th Congressional District, that is correct.

Q. So that there is no complaint about the Congressional District; is that it? A. As I indicated earlier, the complaint, the way it was set up was illegal and unconstitutional, however we are all in the same district.

MR. LEWIN: Your Honor, may I, for purposes of [49] this particular preliminary injunction, state that we are seeking—that there is a difference between the Congressional District and the Senate and Assembly Districts, in this sense we think there is a much stronger basis for preliminary relief based in irreparable harm which derives from the Senatorial and Assembly Districts than there is from the Congressional District.

THE COURT: Yes, I understand.

BY MR. BONINA:

Q. We do know each other, do we not? A. Since Monday.

Q. Well, we had shared a dais before that. A. We shared a dais with a county committeeman and with other people, too, whom I don't remember. I think the Judge was there.

Q. In fact, you came here to this court today, am I correct, and your position is that your elected officials do no longer represent you as a cohesive unit, that is, the Hassidic community, that is, with reference to the Senatorial and Assembly lines? A. That is correct, but also the other positions you forget to mention, the Assembly Petition also has candidates to the judicial—

[50] Q. We will get to that, Rabbi, but basically you are speaking about your elected officials from the Assembly District and your elected officials for the Senate, too? A. And the District leaders.

Q. Yes, and for the Senate, am I correct? A. And for State Committeemen.

Q. Well, now, Rabbi, when you speak about State Committeemen, you are speaking about the Internal Affairs of a political party. A. But registered voters participate in the internal affairs of political parties.

Q. Yes, they do, and in your community you have registered voters— A. Of all parties.

Q. Of all parties? A. Yes.

Q. Now, then, is it fair and accurate to state that there are registered Liberals who are Hassidim, registered Con-

servatives who are Hassidim in your community, that there are registered Republicans who are Hassidim and there are registered Democrats who are Hassidim? A. That is entirely correct.

Q. Now, then, in fact, the Hassidim participate, do they not, in the internal affairs of the four political [51] parties? A. They participate in the affairs of every party where they have voters, that is correct.

Q. Now that being correct, then, Rabbi, isn't it also correct that having participated in the four political parties the Hassidim then are not acting as a cohesive unit but are now divided into the four political parties? A. That is not so; to be an effective cohesive unit you participate, but you don't force somebody to go along with one party, that is undemocratic, so everybody is entitled to the party of his choice. However, we make sure that whatever people are participating they participate fully in the process, that is in the strength, otherwise our cohesiveness would not exist.

Q. Your cohesiveness is as Hassidim? A. As Hassidim and as a group of voters.

Q. Now, in any of your papers do you challenge the party positions that are sought for by the various individuals of the various political parties as unconstitutional? A. I don't understand.

Q. You don't understand the question? A. No.

Q. This year, am I correct in this, in this year the various candidates in the four political parties seek [52] party offices? A. That is correct.

Q. And those party offices include county committeemen; do they not? A. Yes, sir.

Q. They include state committeemen; do they not? A. Right.

Q. And they include judicial delegates; do they not? A. Correct.

Q. And in the Democratic Party I think there is even a national committeeman. A. That is correct.

Q. Is that correct? A. Yes.

Q. Now, in any of your moving papers do you ask for relief against the political parties that are involved? A. I don't understand, it is a legal question, I can't understand it. I didn't study the papers, I am not a lawyer. I can't answer that.

If you ask what the papers say along those lines, I don't understand.

Q. Have you joined the political parties, the four political parties in as party defendants in this action?

[53] MR. LEWIN: I think we can have a stipulation that the papers indicate that the parties are not a part of—the political parties are not a part of the action.

MR. BONINA: So that in fact we have a stipulation that the party position sought for in any of the four political parties are not a part of the moving papers, counselor?

MR. LEWIN: The challenge in this lawsuit is to the lines drawn for the 1974 elections for Assembly, Senate and Congressional Districts.

I myself don't understand the import of the question as it applies to that challenge. That is what we are challenging.

To the extent that that incorporates the challenge to whatever primaries may be conducted in view of those lines, yes, we are challenging something that has to do with the political parties. To the extent it does not involve primaries, we are not challenging the political parties and they are not necessarily a party of the lawsuit.

MR. BONINA: Well, that is a question of law, counselor.

MR. LEWIN: I have just advised that we are [54] challenging the assembly lines and because all the assembly lines in the state are in the same as the state committee lines, then I suppose we end up challenging the committee line because we have challenged the assembly lines. But we don't have to join the parties to do that.

MR. BONINA: I have no further questions, Rabbi.

THE COURT: Any further questions?

MR. SCHNAPPER: If I may be permitted to ask a few more questions, your Honor.

THE COURT: Yes.

[55] BY MR. SCHNAPPER:

Q. Rabbi Friedman, will you describe the voter registration activities in which you and others have engaged in in Williamsburg since May 29th of this year when the new lines were enacted? A. Yes, sir.

Q. Will you describe those activities. A. In what relationship, how we registered people?

Q. What have you actually done to register people? A. We announce, we put it in flyers, we mention it in the newspapers and in local newspapers the registration, and whenever we meet in a synagogue we ask, "Why don't you register," "Come up to register."

We continually ask, "Why don't you register," we ask people and that is how we get our first-hand reports, people tell us, "Because the system is against us."

Q. Are you a Deputy Registrar? A. We have Deputy Registrars.

Q. And they have been registering people? A. Yes, sir.

Q. Can you tell me where? A. All over Williamsburg, 82 Lee Avenue, among other places, wherever designated, I don't remember the whole list, I can't answer that.

[56] Q. Do you have statistics as to how many people have registered with those Registrars in the last—since May 30th? A. I don't have it with me.

Q. Can you tell me how many letters you sent out urging people to register? A. I will go back to the first question, I do remember that before—well, let me say that we have to take them over to the Board of Elections every week or so, that is the completed registration, and there were much, much, much more, and I don't remember having taken any up within a recent date, lately.

Q. Well, can you tell me for example, and it has been now approximately three weeks since the new lines were enacted,

can you tell me how many people you have succeeded in registering in the three weeks before the lines were announced? A. Personally, what I have been registering, it would be less than 100.

Q. You alone registered that? A. Which I signed as Registrar, to be less than a hundred.

Q. A hundred people? A. Less than a hundred.

[57] Q. Well, about how many? A. Between 50 and 100.

Q. Maybe 50 to 100 in that three weeks alone? A. Which I signed my name to, and most of them are 18 years olds who have first become eligible.

Q. Was that in connection with a school? A. No, that is how we operate, we register people as soon as we can register them.

Q. I see.

You personally haven't been able to register anybody in the last three weeks? A. Personally, I don't remember registering people, I was busy with the court case, of course, and that would be the answer.

THE COURT: When you say, "register," do you operate in a polling booth?

THE WITNESS: No, you see, I am a Deputy Registrar, we can register outside as an extension of the Board of Elections, we have to be trained by them and to be sworn in. It is a whole procedure which we go through every year.

BY MR. SCHNAPPER:

Q. I take it that in the last three weeks you have been primarily busy with this litigation. [58] A. I said this week I have been primarily in this litigation and that is why I am hard-pressed to give exact figures under oath as to what happened.

MR. SCHNAPPER: Thank you, thank you.

MR. MCGOVERN: I am Kevin Patrick McGovern, I represent the Conservative Party.

CROSS-EXAMINATION

BY MR. MCGOVERN:

Q. Rabbi, do you know what the term gerrymandering means? A. Gerrymandering is a dirty word when it comes to a community, that means cutting up communities, depriving them of that which is their just right.

Q. Do you know what the effect of gerrymandering a district is? A. It is to alienate the voters in the district.

Q. Pardon? A. To hurt and to alienate the voters in the district.

Q. Would you say it was to disenfranchise the voters of a particular group or community? A. That is exactly what I have said in different language, it does disenfranchise the voters in a community.

Q. If this election were allowed to stand with the [59] lines drawn, would you say that the election franchise would be denied to the Hassidim? A. Definitely, which I started to indicate before as to the judicial convention delegates. There the convention nominates people to be Supreme Court Judges for 14 years.

Now, if you go for this this year and leave these lines and then the next year you make another election, those judges who are nominated, they will be on the bench next year and for 14 years, so anybody running for judicial delegate, he will suffer irreparable harm if he cannot represent the whole community, the entire group of voters.

Q. Well, to clarify the point, the judicial delegates or the alternate judicial delegates are chosen from the assembly districts? A. I mean the candidate from the 57th Assembly District, that is correct.

Q. You mean the Democratic Party, the Conservative member? A. Yes.

MR. MCGOVERN: Thank you, Rabbi.

THE COURT: Anything else, gentlemen?

All right, you may step down.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

[60] MR. LEWIN: I will call Mr. Abraham Gurgess.

Abraham Gurgess

residing at 195 Adams Street, called as a witness on behalf of the Plaintiffs, having been duly sworn by his Honor, Judge Bruchhausen, testified as follows:

DIRECT EXAMINATION

BY MR. LEWIN:

Q. What is your profession, Mr. Gurgess? A. I am an attorney and I am also the executive member of the 57th Assembly District.

Q. You are elected to that post? A. No, I was appointed to a vacancy that occurred in 1972.

Q. And is that a district leader? A. That is correct.

Q. And is there another district leader in that district? A. A female district leader, her name is Theodora Martinez.

Q. Was she elected? A. She was elected.

Q. So is that the district in which the Hassidic community of Williamsburg resides? A. Yes, sir.

Q. Were you familiar with that election in which [61] she was elected? A. Yes, I am.

Q. And in the course of that election, did the Hasedic community of Williamsburg support any particular candidate? A. Well, there were several candidates running, some of them were of the Jewish faith, some of the Spanish faith, and they supported Theodora Martinez.

Q. As against a Jewish candidate? A. That is correct.

Q. Are you familiar with the voting patterns of the Hasedic community in at least in their public purported candidates? A. Yes, I am.

Q. And has that pattern been to support Jewish candidates particularly? A. No, it hasn't.

Q. Has it supported anyone along racial lines? A. No, it hasn't.

Q. How would you describe the factors that go into the decision of the Hasedic community, that is what factors determine whom they are to support? A. Well, the Hasedic community is a small, relatively small community and covers the 57th Assembly District. They are involved with people of all ethnic [63] backgrounds, and particularly sit on committees, and here I am referring to Albert Friedman who sits on the board with people of all nationalities, black, white, Spanish, et cetera.

I think over the last several years the people of the 57th Assembly District have learned to work together, and I think this is really the injustice that we are talking about here today, it is that the people having worked together now are told that they can no longer work together because they are of a certain race.

Q. Would this in your view lead to encouraging voting along racial lines? A. Absolutely, it is pitting, it is pitting one race against another race, which I do believe was not the intention of the law suit which was filed and successfully taken by the NAACP.

Q. So is it that by the action that was taken in dividing up this community because of racial factors, therefore, members of that community are being encouraged to vote for members of their own race. A. Well, I think, I think that might not be what is on the top of the lever, that is what the talk is around that we hear, we are being at this point told that we must have someone of a certain race representing us as opposed to having a good man representing us.

[64] Q. You have heard Rabbi Freidman testify about voting registration efforts in the Hasedic community.

Do you think from your familiarity with that community that they would be affected by this division in the community in half for this 1974 election? A. I think it would be, the same as any community, whether it be Spanish, black or Hasedic. It just happens to be that the Hasedim are in this district specifically, and it would be the same as if it

were purposely divided because of race, which I believe to be unconstitutional.

Q. Well, would it slow down the registration in the Hasedic community? A. Yes.

Q. Would it discourage voter participation in the Hasedic community? A. Well, it would discourage them because of their unawareness. Even to myself at times I have difficulty in knowing who the Senator is, from what part of the district, and who the assemblyman is and from what part of the district and where the lines are exactly drawn.

I think, I think what has to be brought out before this Court is that the purpose of having smaller areas and an assembly district is because in the course of the legislators they find that someone must know the smaller [65] area, the smaller problems within an area, a Congressional district, for example, covers a much larger area of space, most of the Congressmen are in Washington and can be contacted but they handle several hundred thousand of people.

A Senate district similarly handles a certain amount of people and the Assembly District handles approximately, if I am correct, 120,000 people and there is a much closer relationship between the people who live in the district and those elected officials, which makes an awful lot of sense because they had daily problems which they come to you on.

Now very specifically in the Hasedic area, the Hasedic area, these people have a very stringent philosophical religious belief, and I will give you an example of what the division does do; for example, at the present moment, they are seeking to put up a nursing home in the area there. A nursing home is needed specifically for Hasedim because they have certain religious needs——

Q. Food? A. Food, et cetera.

Now, I believe a black assemblyman could do just as good a job as a white assemblyman, without any question of doubt in my mind.

However, if you have a district cut in half and where you have a single problem, it would be very, very [66] difficult

for two assemblymen to be working, even if they may be working together to solve the problem, rather than having one person working on a specific problem that entails that whole community.

I would say that, as I think the testimony here before has said, that no matter where you put a group, the important thing here is geographically to make sure that they are together, and to deny them the right—and when I say “them” I mean black, Spanish, or Hasedim, to deny them the right to be able to be together where they have similar problems well, is actually a spit in the eye of our Constitution.

Q. Now, were you involved, Mr. Gurgess, in any of the discussions with the Joint Committee on Reapportionment in the State Legislature? A. Yes, I was.

Q. And prior to that time that this 1974 reapportionment was drawn up? A. Yes, I was.

Q. Specifically, with whom did you talk? A. When I heard that lines were about to be drawn, I sent registered letters, return receipt, to Mr. Zuckerman; I sent letters, return receipt to the Justice Department, to Mr. Duryea, to Mr. Wilson, [67] Governor Wilson, to Senator Anderson, and I requested them to give us an opportunity before they would be implementing any lines to have the community give their side of the story and give their input before those lines were put into effect, no matter what those lines would happen to be: I did this specifically on the request of the Hasedic area and the black area, who were just as concerned with the lines so that they would not be gerrymandered as they felt in the past they had been.

[68] Q. Did you get an opportunity to be heard of that request? A. No, I didn't. I received a letter back from Mr. Zuckerman who had indicated as I recall that I should be in touch with the Justice Department, but to date I have not received back anything except my little card which said they had received my letter.

Q. Was anything communicated to you from any member of the JC Committee on Reapportionment regarding the reasons why the lines were drawn as they were for 1974?

A. Yes, they specifically told me that race did not play a part in the drawing of lines.

Q. Just a part? A. A specific part.

I did meet with Mr. Scolaro. I was up in Albany when the lines were being drawn, I brought my own census tracts, we tried to analyze the various census tracts prior to going up there so we would have some kind of an input and at least know partially what we were talking about.

While I was up there I did meet with Adrian Shill, who is a representative of the minority leader, Stanley Steingut, and Mr. Scolaro, at the date which would be the date of the special session, and I spent two days up there without sleep all those two days.

I had specifically been in touch with him in reference [69] to keeping the Hassidic community together. I asked them to place it anywhere they wanted to except that they should keep them as a whole and do not divide them.

On three instances they had to put it into the computer, some of the recommendations that I had made, and they did finally come up with an indicated that if they kept them together, they would 53.4 per cent of white—of, of black within the district.

Q. You mean by “black,” you mean minority? A. Minority.

That is wrong, I didn't mean “black,” I meant minority.

Q. Blacks, Puerto Ricans,— A. Right, blacks and Puerto Ricans.

They did indicate to me that in their talks with the Department of Justice, that is, during these conversations, they had had it indicated to them that they must have 65 per cent minority.

I did indicate to them that I thought it was unfair when we talk about a community to be talking about a percentage of 1 per cent and felt it would be much fairer to talk about

geographically, that whatever the percentage is, the per cent black, that geographically is what it should take into consideration when they set their lines, and not purposely say, We must divide the Hassidic area because they are white, because that would mean separating them into at [70] least two different districts.

I further spoke to them with reference to senatorial lines and I advised them that senatorially-wise that to be talking about race was wrong, that in my opinion blacks and Puerto Ricans have been gerrymandered in the past and that it is injustice to gerrymander blacks and Puerto Ricans and that one must not do the exact same thing that the Constitution was talking about by reversing it and giving it to the Hassidim, that this was wrong.

Q. It was your understanding that the only reason that 63.4 per cent was not adequate was because it had to be a specific minimum racial percentage in the District? A. I had suggested to them that at that point when they had brought the Hassidim district together, and I believe it came out to 62.3 per cent, I had suggested to them that they pass those lines, and if after they passed those lines there should be a separateable clause within the legislation and that was given so that in the event the Justice Department felt that that would have been unconstitutional that we would then go back to the lines as drawn by the legislatures. This seemed to be some kind of a compromise and seemed to be moving ahead. I know that Assemblyman Streisand was very much working in that direction as well, and then the session was adjourned to the following morning, and this is only upon information and belief, I have no direct knowledge, of course [71] but I understand that the leaders of the various houses as well as Governor Wilson had at that time indicated that he would not go along with a separateable clause.

We were negotiating continuously and talking continuously, and as I said this was going on over the two days when one of the houses seemed to adjourn, and that was it,

the Senate seemed to adjourn while we were in negotiation and the Assembly had to be called back after adjournment because they felt there was an injustice done, and they had passed a resolution changing a part of the lines, that which of course could not be instituted into law because it was just a resolution. Many of the members were already leaving. But I think everybody up there whom I spoke to, including the black legislators, had indicated that they felt it was a wrong, and I am specifically referring to Calvin Williams who represents the 56th Assembly District, he indicated that he was willing to change the line so that the lines would be the same for the Hassidic area. Jeffrey Anderson who is the Democratic Executive member of the 56th Assembly District had indicated that he also felt that this was wrong, that the line should be changed so that the Hassidim could be together.

For the information of this Court, and I think this may be important, there are two specific districts, the 56th and the 57th Assembly Districts, which are joining, and there are approximately 16,000 registered—16,000 in [72] population that was taken directly out of the 56th Assembly District and brought into the 57th Assembly District, and the Hassidic area which represents approximately 15,000 votes were put into the 56th Assembly District.

I would indicate, without going into the aspects of the Congressional or Senatorial problems at the present time, that it would be very easy to merely transfer those election districts which I think number four from the 56th to the 57th, and from the 57th to the 56th, and population-wise you would end up with the exact same population and you would have a cohesive area for both areas.

I think the legislators of both areas are also in accord and I should indicate that the legislator in one area happens to be Jewish and in the other area, which is called Williamsburgh, he happens to be black.

Q. What is your understanding from these negotiations with the legislative committee, is it to the effect that the

only reason that this was not done was that he Hassidic community is white? A. Yes, sir.

Q. That was the only reason that was not acceptable? A. That is correct.

[73] Q. Mr. Gurgess, you testified, if I remember correctly, that in your judgment the Black and Puerto Rican communities in Brooklyn had been gerrymandered; is that correct? A. I think the black and Jewish communities, the Black and Puerto Rican communities have been gerrymandered throughout the United States.

Q. Well, I think the Court's jurisdiction is somewhat more limited.

Let us talk about Kings County.

Is it your judgment that it was gerrymandered not only in the '74 lines but the previous lines, in Kings County? A. I came to that conclusion by merely looking at a map, and by looking at a map and having some indication as to how lines should be drawn, they seem to indicate, without any personal knowledge in my mind, that geographic areas were not used to bring about lines but there were other reasons, and that would lead me to surmise by that inference that there probably was gerrymandering.

Q. Well now— A. And I would say the gerrymandering does not mean that it is racial gerrymandering, gerrymandering also means for example that the Democrats who may be more powerful [74] and I'm not really talking about whether they are Democrats or Republicans, but they may gerrymander a block because they feel that there is someone living on that block that they don't want in their district, and it may very well be the Republican Party that would say that they would want to make a better assembly district for a Republican who may be running, or it may be a Democrat who may say he wants to have a better assemblyman, and for that purpose it may be done.

I think there are many, many reasons why lines are drawn, and I would indicate that in my opinion that there are also racial reasons which are improper, and I am talk-

ing now about the Black and Puerto Rican communities, and that such actions are improper on their behalf.

I think that it is wrong to draw a district for a candidate, I think it is important to draw a district for people.

Q. Now if I can just get back to what you said before, you said that the district lines in Kings County had been gerrymandered against Blacks and Puerto Ricans and that there may be other kinds of gerrymandering: Is that your testimony? A. No, it is—I think I will stand on what I said.

Q. Well, you will stand on what you said the first [75] time or the second time, on direct you made it pretty clear you thought there was gerrymandering against Blacks and Puerto Ricans, or do you take that back and say what you just said? A. No, no, I am saying there is gerrymandering of all different kinds, I think racial gerrymandering is of race.

Q. So that has happened? A. I think so.

Q. Okay.

Now, can you tell me in what way Blacks or Puerto Ricans could be harmed by gerrymandering on the basis of race? A. Gerrymandering in my opinion, in my opinion the definition of gerrymandering is the exclusion of people purposely to be able to vote for a candidate by leaving them out of the electoral process, and that is no matter whether that is race or color, maybe, and so for example if you purposely put in a very very minor amount of Blacks or Italians, which is presently happening in another district, then what normally happens, not because—not because this is the only answer but because of the human being, if you are in an Italian district and it is all Italian and you put in a Jewish name, an Italian name, my experience has [76] been just as a fact that the Italian will probably win.

Q. If I may, let us get back to the racial question:

Suppose it were the case, and I think the evidence indicates it was, that you had half a million Blacks and Puerto Ricans living in a contiguous area and that you have Blacks and Puerto Ricans, for example, in overwhelming majority

in two senatorial districts, and that instead of being in those senatorial districts they were split among five or six and were thereby not a solid majority in any one district, would that in any way harm the Blacks and Puerto Ricans?

A. Of course it would, if that was your purpose.

Q. They would be harmed, whether it was the purpose or not, the lines would be in the same place. A. If the purpose of doing that was to exclude them from giving them the rights of bringing up their candidate whom they might want and who might be of a certain color, of course it would hurt them.

Q. Do you think it would tend to alienate the Blacks and Puerto Ricans because they felt that it was like they had been slapped in their face because the community was split up? A. It certainly would, but I think it would go a [77] little beyond that, I think what would happen, and I think specifically in the Black and Puerto Rican area, I personally believe that the answer, the true answer to having good representation and equal representation is heavy registration—

Q. Let us not— A. And if I can finish, if I can finish, if there were heavy registration that means people go out and vote.

The reason why there is not heavy registration is not because of gerrymandering, that is not one of the reasons, the reasons that people don't register and vote is because a lot of people are turned off, the poor in this respect that when they don't have housing and they don't have schools and they don't have all of these things and there are people of all different races, they find, no matter whom they elect, that they still don't have schools and housing, etc., and they feel that their vote doesn't count, and that is what, in my opinion should be the push of people who are really concerned about saving this country.

MR. ZUCKERMAN: Your Honor, I have to object to the question that was just asked, it implied that there is evidence that there are some 500,000 Blacks and Puerto Ri-

cans who were divided into five senatorial districts where they did not have a majority in any one of those districts, the evidence [78] simply doesn't point to that.

If it is hypothetical, that is one thing, but I don't think the record should show there is any evidence to support that question.

MR. SCHNAPPER: I think there is, but it is not necessary to resolve.

We will regard that as a hypothetical question.

BY MR. SCHNAPPER:

Q. To return to that hypothetical, I take it that it is your testimony that just by splitting up the Hasidic community you would be alienating and discouraging Hasidic registration and voting and that it would have the same effect on Blacks and Puerto Ricans? A. Well, I would not be sitting here and testifying if they were dividing up the Black community, that is dividing it equally as they have done the Hasidic area. I happen to personally represent a district that has 62 percent Black and 38 percent White, and in the past I have represented a Black district where this specific thing has happened. I think it is a wrong, it is a wrong no matter who is involved.

Q. Now if the legislature were to find that that kind of a wrong was being committed, what can they do about it? A. The Legislature?

Q. From your judgment what would be reasonable if [79] they find the Black community has been split in half, could they put it back together? A. I think they have a moral and legal duty to correct any wrong.

For example, my understanding is specifically on the 57th Assembly District that there is an apartment house at 75 Henry Street at Cadman Plaza which has approximately 1200 people in it, which was erroneously divided in half because the wrong maps were used to bring about the district.

Now, if we have the power to correct something that is erroneously done, then I hope that the legislature has the

power, has the power to correct something that was purposely done.

Q. Well now, I take it that you are aware that Mr. Pottinger issued a ruling as to the district lines: You are familiar with that letter? A. Yes, I am.

Q. Now, with regard to the various district lines, you suggested that the basic change with regard to the 57th Assembly District was that certain Hasidic voters had been put in the 56th Assembly District; is that correct? A. That is correct.

Q. Now— [80] A. I should say gerrymandered in.

Q. Well, let us—

THE COURT: Counsel, this is the usual time for adjournment, for recess.

If there is no objection we will now recess until 2:15.

MR. SCHNAPPER: Fine.

THE COURT: All right, a quarter after two.

(At this point a recess was taken until a quarter after two.)

[81] CROSS EXAMINATION CONTINUED

BY MR. SCHNAPPER:

THE CLERK: Mr. Gerges, please. You are previously sworn. Please resume the stand.

Q. Mr. Gerges, I believe on direct testimony we—before we broke for lunch you testified that the present assembly lines had been arrived at primarily by switching a substantial number of whites, mostly Hassidim, out of the 57th into the 56th and taking blacks from the 56th and moving them over into the 57th? Is that essentially correct? A. Yes.

Q. Now, could—I should say, specifically Hassidim were taken. In other words, there are other parts of the District that may have whites in it. That portion was not changed. The Hassidim, I understand that. Now, could you conceive of a way of drawing the boundary between the 56th and

the 57th Districts so that the Hassidim were all in the same district but both the districts had more than 65 per cent non-white population? A. I do not have enough sufficient knowledge. When you are talking about percentage-wise, I wouldn't know exactly. It may come out to 63.4 or

Q. Let me suggest a typical hypothesis. I remember the proposal you had made to the Legislature was that Hassidim [82] —by way of background, my understanding is the 57th District under the new lines is about 65 per cent non-white and the 56th is something like—something in the 80's? A. I think it's 64.

Q. Sixty-four, and the other one is something in the 80's. The exact numbers are in the record.

Now, you had suggested to the legislature that the Hassidim in the 56th be moved back to 57th which would have lowered 57 down towards the lower end of the 60's. Couldn't one just as easily have met your criteria by moving the Hassidim into the 57th over into the 56th? And you would have been happy if that had been done? That would have put them in the same district? A. I don't believe so. I don't believe that the percentage-wise would have come out the same. I think—for example, I think the—the 56th is 85 or 90 per cent. Something in that area. I don't think percentage-wise that could have been done.

Q. It wouldn't have become 65. The point is, if you moved all those Hassidim in, it would have been more than 65 per cent? Because it's so heavily black now? A. Well, I happen to personally disagree with those figures because I think those were 1970 census tracts, if I recall correctly, and I don't think that as of today, that those are correct figures. [83] Q. You think the area is even more non-white than it is in those statistics? A. I don't know which—one way or another. There are so many—in the surrounding area, there are so many changes that I am not exactly sure personally just what it is as of today. I think it's immaterial really.

Q. Now, do I understand you correctly if you say that sometime prior to the actual enactment of the 74 lines, you had one or more meetings with Mr. Scolaro? A. Yes.

Q. How many meetings were there? A. It was going on all day long.

Q. I see. A. Might have been many.

Q. Is this the same period of time, two days that you were in Albany, while the legislature was in session? A. Yes.

Q. Did you speak with members of the legislature at that time, aside from talking with Mr. Scolaro? Did you also make your views known to the members of the legislature? A. A few of them.

Q. A few of them.

I take it, you didn't succeed? A. Well, I think, I'll put it—I think that what—what was occurring was that there seemed to be [84] interference with the Justice Department as to what the legislators wanted to do.

Q. I see. Okay. Now one final question.

THE COURT: Which Justice Department are you referring to?

THE WITNESS: The Federal Justice Department.

MR. SCHNAPPER: The State Department, I believe, is called the Department of Law, if I am correct. Is that correct?

MR. ZUCKERMAN: That's correct.

Q. One final question. With regard to the—the decision of Mr. Potinger, when he ruled on the 1972 lines and held that they were discriminatory, did you prior to his decision send him any memoranda or letter urging that the 1972 lines be approved and that they were not discriminatory? A. No, I did not.

MR. SCHNAPPER: Thank you.

REDIRECT EXAMINATION

BY MR. LEWIN:

Q. Mr. Gerges, just on that last series of questions that Mr. Schnapper asked you. From your discussions with the

legislators, was it your understanding that they wanted to keep the 1972 lines? A. Yes.

Q. And the only reason that they changed and moved [85] —and split up the Hassidic community was because they were directed to do so by the Federal Department of Justice? A. That's what they seemed to indicate to me.

Q. And that's what Mr. Scolaro indicated when he talked to you? A. That's correct. He was trying to—he was trying to, I think—and he had never told me but I think he was trying to keep the Hassidim together but he felt he was being directed by Washington to break them up. That seemed to be the indication.

Q. Now, you talked in—I think you spoke this morning in your cross examination, in answer to Mr. Schnapper's question about the harm, if a black community is split up. Do you know of any black community in the County of Kings that is split up the way the Hassidic community would be split up by these lines? A. Absolutely not.

Q. Is there any comparable harm to any black community that you know of by being split up in this way? A. No, I have—I have read the brief of the NAACP in some other cases that they have, and I have never in my experience ever seen an injustice specifically where a group of people purposely were cut up in half, and I would say there is nothing comparable to that in any area, that I have knowledge of, in any event.

[86] Q. I think there was some cross examination into the area of whether there was racial, past racial gerrymandering in your opinion. Do you know of any particular instance that you examined in the history of division of political lines in the State of New York where there was deliberate gerrymandering in order to keep black communities in a specific election district or assembly district or senate district? A. No, I do not.

Q. In your view, would the lines drawn for the assembly district and the senate district that are involved in this case

correct any past injustice done to the black community?
 A. Absolutely not. I would say that the—the irreparable harm that would be done to the Hassidic community, in which I have seen on a first hand basis, is that—is that a person would say to me, “Why should I register if I am going to be divided and the law is going to direct me to be divided? What is my purpose in registering?”

Q. People have said that to you? A. Absolutely. People have refused to sign petitions saying that if justice works in that manner, we don’t want to be involved in the political voting. If this is what they’re doing to us purposely.

Someone said to me, which I think affected me more than anything anyone said, was they couldn’t do it to us in [87] the concentration camps and they are trying to do it to us here. That is the emotional type of think that is going on within that district.

Q. In your familiarity with the black community, would an election, even assuming that there were some malapportionment in the black community, would a single election in the black community involving malapportionment of that kind have that kind of effect? A. I don’t believe so.

Q. Would a single election in which the Hassidic community is divided up in that way have a lasting effect? A. Absolutely.

Q. Would that be cured by a change two years later? A. Well, once you destroy a community that has taken so long to build up, it would be impossible to restore it to where it was beforehand.

CROSS EXAMINATION

By Mr. McGovern:

Q. Mr. Gerges, would you say that if the present lines were allowed to stand, there would be a substantial infringement upon the elective franchise of the members of this community? A. Yes.

Q. Would you say that it would be tantamount to a deprivation of their constitutional rights? A. Yes.

[88] Mr. McGovern: Thank you.

The Court: Is that all of this witness?

Mr. Schnapper: Just one question, Your Honor.

RECROSS EXAMINATION

By Mr. Schnapper:

Q. Mr. Gerges, did Mr. J. Stanley Pottinger, the Assistant Attorney General of the United States, acting pursuant to the Voting Rights Act, rule on April 1st of this year that the 1972 district lines have the effect which is discriminating on the basis of race? A. Well, I would say one would have to reread the decision. I’ll not interpret his decision.

Mr. Schnapper: Thank you.

The Court: What statute gives the Department of Justice the right to do this?

Mr. Zuckerman: It’s Title 42, United States Code, 1973 (c).

The Court: Give me that again?

Mr. Zuckerman: Title 42, United States Code, Section 1973(c).

The Court: What is that section?

Mr. Zuckerman: 1973(c).

The Court: What’s the voting?

Mr. Zuckerman: That’s the key provision for it.

The Court: That’s quite an extensive statute. [89] I’ve read it a few times.

Mr. Zuckerman: Yes.

Mr. Lewin: Of course, our argument, Your Honor, is that it does not give the Attorney General the authority to do what he did in this case, on the standards that they applied in this case.

The Witness: Am I excused, Your Honor?

The Court: Are you through with this witness?

Mr. Lewin: Yes.

THE COURT: All right. You may step down.
[90] MR. LEWIN: Rabbi Stauber.

Chaim M. Stauber

having been first duly affirmed by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIN:

Q. It's Rabbi Stauber? A. Yes.

Q. Rabbi Stauber, how are you employed? A. I'm the director of the National Committee of Orthodox Jewish Communities and editor of Der Yid, Yiddish language weekly newspaper, catering mostly to Orthodox and Hassidic Jewish communities.

Q. The newspaper you edit, Der Yid, is that—how often is it published? A. Weekly.

Q. And is it the main organ of dissemination of news within the Hassidic community in Williamsburg? A. I believe it is.

Q. How long have you held that position? A. As editor, for two years.

Q. Were you involved with it prior to that time? A. Yes, sir.

Q. Well, in what way? A. As a writer and contributor.

[91] Q. How long have you lived in Williamsburg, the Hassidic community? A. Since 1957.

Q. In your capacity as editor of the newspaper and the prior positions you held, have you become familiar with the community and its opinions? A. Yes.

Q. That's part of your job; isn't it? A. Yes.

Q. Does the newspaper itself express editorial views on political issues? A. Yes, it does.

Q. Are those views generally reflective of the views of the Hassidic community of Williamsburg? A. Yes.

Q. Has it at times expressed support of candidates in elections? A. Yes.

Q. Just turning to that subject for a moment. Has the history of support given by the newspaper in the past been one of support based on racial or religious lines? A. No.

Q. Has the newspaper supported other than Jewish candidates? [92] A. Yes, it has.

Q. Have you any illustrations? A. Oh, yes, quite a few.

First of all, we have endorsed candidates in many areas, other than Williamsburg.

In Williamsburg itself I remember having endorsed a gentleman by the name of Mike Hernandez, a Puerto Rican.

The names that have been mentioned here before, Theodora Martinez, co-leader, John Rooney, of course, is the well-known case. Vita Batista, for instance, we have endorsed as—I believe he ran for—he had a Jewish opponent.

We have endorsed, for instance, Emanuel Seller against Elizabeth Holtzman. There are many cases. I can't recall all of them, but we most certainly never considered religion nor race nor color nor creed an issue when it came to endorsing candidates.

Q. Has it been your experience in discussions with members of the community that the Hassidic community of Williamsburg generally follows the endorsements of the newspaper in terms of their actual voting practices? A. Well, my answer to that would be that I am not only aware of the community. I happen to live in the community and I've been very active in the Williamsburg community ever since 1957.

[93] The community in Williamsburg follows the leadership of the paper, as well as the leaders of the community. It's a cohesive, close knit community, bound by common cultural, religious and social bounds.

Q. Now, with regard to that community, could you describe that in general terms also, as far as its attitude towards the outside secular world is concerned? A. Yes. Historically, Hassidic Jews have no place in politics. I think it would be appropriate for the record to first define the term "Hassidim."

Q. All right, why don't you do that? That's a good question. Something we've taken for granted, but please do that.

A. Hassidim is plural for the term Hasid, singular which means pious.

The word chesed in Hebrew is a term describing benevolence, charity and piety as well.

I think that the Hassidic Jews are no different than other co-religionists, with the exception of being very close knit, trying to help one another and trying to contribute to one another in whatever way possible.

Now, then, because of our unique and conspicuous appearance—we have been very much discriminated against in the past and it's ironic, by the way, that we [94] are being considered white, you know, included in the majority at a time when we know that if there is such a thing as bigotry and discrimination, we are the ones to suffer.

The Hassidic community historically has been excluded from many, many social, cultural and other common advances and privileges that the average American citizen enjoys.

THE COURT: How long has your group been coming to the Williamsburg area?

THE WITNESS: Your Honor, the Williamsburg community has been since the turn of the century a Jewish community.

THE COURT: I am speaking of your group.

THE WITNESS: The group, the Hassidic community has started to snowball, so to speak, right after the Second World War when refugees, as pointed out before—and I don't want to get into that issue again—but it was mostly refugees that came from Europe, who have started to really nestle in the community and it—if—I think it should be noteworthy at this point that the community has gone through many trials and tribulations.

Williamsburg, the Jewish part of Williamsburg, used to extend far beyond its present boundaries. I myself per-

sonally used to live in the 56th Assembly— [95] actually it used to be 58th Assembly District on South 5th Street, and there used to be a very large Jewish Community all the way down to Willowby Avenue.

Somehow, for reasons beyond our control, because of the delapidation and other natural problems confronting this City, at large, we have been squeezed together little by little, so that at present we are taking up a very minute and small part of Williamsburg, bounded by—I think the entire area consists of something like 20 or so square blocks.

Q. There has been some testimony here that the population, the total population is in the neighborhood of about 30,000; is that right? A. That is an approximate figure that we have been—

Q. And the lines that have been drawn for purposes of assembling Senate district is somewhat different but do they approximately divide that voting—that actual population in what, in half? A. It's about a bull's eye, right on the heart.

Q. Now, I think you were telling us, giving us that background information, as introduction to telling us what the Hassidic community—how the Hassidic community today views itself vis a vis the outside world, or views the [96] outside world? A. Right. We have been made to suffer in the past and it was only by sheer necessity that we realized after awhile the only way we can fight for survival is by joining the democratic process by an orderly fashion, a democratic fashion.

We don't believe in vigilantes and we don't believe in fighting in order to bring to light our problems and our cause and, therefore, we found that the only orderly way to get something done is by joining the democratic process of registering to vote, seeing to it that people fully participate in their franchise as American citizens and I believe that we have been quite successful, considering the reluc-

tance on the part of the Hassidic Jewish community in the past.

However, I might add, and I think it's a very important point, what this reapportionment thing has caused, and I don't know how many people are aware of this from my own community, and I as editor of the paper, was told by many people, in letters and writing as well as by telephone, that there are some people that believe that somebody in Albany wanted to get even with the Hassidic community for really having the guts and having the clout to be a considerable force and factor in the political life of the City.

Because of the publicity it somehow backfired [97] and some people feel that we are simply being penalized for taking a stance in politics, for not knowing our place, so to speak, remaining in Synagogues, instead of coming out and really turning out the vote.

Q. So what has been the reaction to that? A. The reaction, naturally, is that, you see, we told you so. In other words, those—you have to remember that the community consists also of younger as well as older and actually there are very few in the community who are middle aged because, unfortunately, most of the older generation has lost families in Europe. They came here widowed, most of them remarried. So you have either the very old or the very young.

And the older ones still have problems shedding the persecution complex of Europe, always felt that our place was never in society, we really have to continue with the self-imposed exile of remaining in a ghetto, of not joining the mainstream. Not even in terms of political action.

The younger generation, being imbued by a sense of freedom and greater equality for all, felt that why sit around and just watch the trains go by without taking any action, without really doing something about it.

After all, you see the way communities have been uprooted all around you and here we are trying to stabilize

the community and try to dig in at a time when others [98] ran away.

Now, these two forces have been opposing——

Q. Could you stop at that point. You say, "Dig in when others ran away."

Is the reason mentioned before that the Jewish community occupied a larger area than that which it now does, is the reason that it occupies that smaller area now the fact that many who lived there left because there was a heavy proportion of blacks, heavy black influx so far as residences? A. Not necessarily. As a matter of fact, I think it was mentioned here before, and this is the irony of the problem, you know, the Brooklyn Queens Expressway, for instance, has uprooted I think an area of something like eight square blocks in order to make way for this monstrosity we know as the Brooklyn Queens Expressway.

Now, we have had public housing projects built, without giving any thought as to what happens to those families who are being displaced, in order to make room for the public housing projects.

And also you have, as I said before, the natural problems that face many other communities throughout the City and we are no exception. The crime problem, the poverty problem. I mean, the physical appearance of any given community, and Williamsburg is no exception.

[99] Those, of course, as I said before, when your Honor asked about the history of the Jewish community in Williamsburg, they used to be a white and even Jewish community, modern Orthodox Jewish community or even conservative or reformed. Those people who are financially better off, naturally they looked for better surroundings and better environment to live in.

Q. But you remarried? The Hassidic community remained while the others fled? A. Right.

Q. That area? A. Right.

Q. And now you are saying what is left of that community is going to be divided in half by the lines between the Senate and Assembly districts? A. Right.

Q. What in your view would be the effect of those Senate and Assembly districts remaining on the books and being used for this election, if it is ultimately determined that they are unlawful? A. I think my answer to that would be, we are already racing against time. I think it's already the 11th hour.

As far as I see it, I think most of the [100] damage has already been done in terms of this devastating blow. The morale has sagged to an all time low. The people just feel that all these politicians, with all due respect, that come to us before election time, with all the rosy promises, don't live up to them. Not even when it comes to a survival of a community.

The feeling is that we have been had, that the politicians in Albany just didn't give a damn as to what happens to a Jewish community, so why come out again and vote for these very people or any other. The politicians just won't stand up and be counted when they are most needed.

Q. Can this be cured, if there is a Court order which puts the district back together again? A. I think that this is the only solution and I think that this is a very historic moment. I think that the only way this irreparable damage could be somewhat cured is by drastic action which would prove that there is justice after all, that somebody at least realizes that this community has been damaged and therefore comes to our aid and assistance, because, as I said, the morale at the present time is really at an all time low.

MR. LEWIN: Thank you.

[101] CROSS EXAMINATION

By MR. SCHNAPPER:

Q. Rabbi, is it Stabler? Stauber? I'm sorry.

Rabbi Stauber, I might start with some questions about your newspaper. I take it that you testified that the newspaper expresses the views of the Hassidic community, particularly in Williamsburgh; is that correct? A. Right.

Q. Has the newspaper urged the people not to register to vote because of the new district lines? A. Contrary to that, Mr. Schnapper, I can show you the latest two editions which naturally would be most reflective and, as a matter of fact, we have urged people that the only way we could get even is by increasing our voter registration and telling them that the only way we could save this community is by proving that, you know, we are not going to take this lying down and we are still in the community to stay and to remain.

In other words, we are trying to naturally tell the people, "Don't let it get at you."

Q. I take it from what you said, if the community is persuaded by your argument, they may, out of outrage at the new lines, register in greater numbers than they have in the past? If you are persuasive? I am perhaps— A. Mr. Schnapper, if I may answer to that, it is [102] just by— what it amounts to is by telling a person, "If you will be blinded in one eye, you will see better with the one remaining."

Q. Okay, I'm not going to fight you proverb for proverb.

With regard to the—I take it not only have you taken that position on registration but you have not urged the people not to vote? A. We most certainly have not.

Q. Now, is it your intention, because of these new lines, to refuse to endorse candidates in the Williamsburgh area? A. Well, at this point I think it would be presumptuous to assume anything. We are still under the terrible shock and I myself am overwhelmed. I've been in this from the very beginning, and if I may state for a moment, Mr. Schnapper, it's amazing that NAACP has seen fit to join in this case as an amicus curie on the side of the defendants and I think what you are alluding to by your line of questioning is that you are actually the defendant yourself or the NAACP.

I think it would be interesting for the record to point out that when I called on June 29th, that Wednesday, when the state legislature was about to act on—

Q. May 29th, I think? [103] A. May 29th. I called Mr. Pottinger, Assistant Attorney General, J. Stanley Pottinger's office, and I was directed by him to speak to a gentleman by the name of James Turner and I had a very lengthy conversation with him over the phone, and Mr. Turner told me that it was only because of Mr. Schnapper, by NAACP, that they somehow have seen fit.

I asked him specifically and deliberately, was there any mention about the Hassidic community being sacrificed on the altar of so-called justice? And he said, "Well, it was mentioned vaguely," but there was nothing we could do because he told me that the whole thing was brought about because of the suit of the NAACP and he was trying to convince me that they never mandated any percentage in the first place, that it was only an effort to increase minority representation but not at the expense of any other community.

As a matter of fact, Mr. Turner further pointed out to me that they will most certainly be alert to this objection on the part of the Hassidic community and they'll take it into consideration.

Now to my knowledge, when I spoke to members of the joint legislative committee and to others in Albany, they were trying to shift the blame back into the Justice Department.

Now, we were just being played ball with and we had a very short period of time, as you know, because of the holiday [104] mentioned before, so that in that span of eight hours, we were just about able to convince ourselves that there was some moving force, and obviously it's the end of NAACP, which amazes me because traditionally speaking, not only have we always in our newspaper, for instance, supported the causes of minority groups, but I think, for the record, it might be worth while to point out that Mr. Roy Wilkins has written a column in the New York Post after the election of John Rooney and pointed out the Hassidic community as an example to be followed by

NAACP, of cohesiveness, of joining forces for the benefit of the community, without looking to race, color or creed, being practical in terms of political reality and therefore, he suggested that the NAACP following the same procedure, not looking at race, color or creed, but as to the candidate, the most qualified candidate, beneficial to the given community.

Q. I hope I've come up with a question that will prompt a slightly shorter answer.

I take it that what you object to—that the harm that you feel the Hassidic community has suffered by these new lines, it has occurred because the Hassidic community is split in half; is that correct? A. Right.

Q. It's not because part of all of the Hassidic community may be in a district that has a non-white majority? [105] You don't object to being in a district of non-white majority? A. No, we don't.

Q. So that as long as—I take it that that is why, for example, you don't feel that you have been harmed by the Congressional lines which leave you in the same district? A. We at this point don't know what to feel because somehow, you know, it's ironic. We just don't know. Is the NAACP our friend or our enemy? We are bewildered. We really don't know.

As a matter of fact, by your line of questioning, we are being convinced that you are against us, and there is no reason why we—we went to great pains in the news media to point out that this is neither a racial nor a religious issue.

Now, I don't understand why the NAACP and you, Mr. Schnapper, should have a vested interest in turning this into a racial issue at a time when we are specifically and deliberately emphasizing time and again that this is a question of a community, happening to be a Jewish community, Hassidic community, but it's a question of the community being split in the heart, in order to achieve certain racial quotas, which we don't understand in the first place.

Now, you asking me, if we object. We have been, I think—it has been pointed out time and again, that we have always been a minority within minorities. Our districts have always consisted of a comfortable majority of minority groups. [106] We never objected. We have always joined forces with them. We have worked as a coalition with other minority groups. This is a matter of record.

We sit on boards together. We work together.

Now, you, Mr. Schnapper, should know about this. I mean, who else would know, that the Hassidic community in Williamsburgh never discriminates against any other.

As a matter of fact, we were the only ones, as I said before, to work hand in hand to stabilize this community.

So therefore, I don't see why you are questioning me in terms of our objection to minority groups. We most certainly do not. We have pointed out here that we have endorsed the candidates regardless of race, color or creed.

Q. I understand. If I could just ask you one final question.

Did you—as you are aware, the Attorney General issued this ruling on April 1st, invalidating the 1972 district lines. Did you, in connection with his consideration of those lines, before April 1st, did you send the Attorney General any letters or memoranda personally urging approval of the 1972 lines or commenting on them in any way? A. No. I personally was not even aware of that ruling.

Mr. SCHNAPPER: Thank you.

[107] REDIRECT EXAMINATION

By Mr. LEWIN:

Q. Did you have any reason to send any letters urging approval of the Attorney General? A. No.

Q. Rabbi Stauber, was there at that point the slightest expectation in your mind that no matter what the Attorney General would do, the Hassidic community of Williamsburgh would remain intact, in any reapportionment? A. There was never any doubt that a voting rights act would

be used against the minority group. It was inconceivable to us that they were trying to accomplish something at the expense of creating many other injustices.

I mean, it just doesn't make any sense.

Q. So you had no particular concern over the claims that were being made attacking the 1972 lines, insofar as the Hassidic community was concerned? A. No.

Q. You had no reason to be for it or against it, other than the fact that the Hassidic community was being kept together in the assembly district where it had previously been, substantially? A. Right.

Q. And in the senate district substantially, where it has previously been? [108] A. Right.

Mr. LEWIN: That's all.

The COURT: Anything else of this witness?

All right. You may step down.

[109] Mr. LEWIN: The Plaintiffs call Mr. Lefkowitz.

Leopold Lefkowitz

called as a witness on behalf of the plaintiff, having been duly sworn by His Honor, Judge Bruchhausen, testified as follows:

DIRECT EXAMINATION

By Mr. LEWIN:

Q. Mr. Lefkowitz, you are a plaintiff in this action? A. Yes, sir.

Q. And where do you reside? A. I reside at 85 Taylor Street, Apartment 8D, Brooklyn, 12111.

Q. Under the lines that are drawn for the new senate and assembly districts, would you be in the 57th or 56th? A. 56th, I think—57th, I am sorry.

Q. 57th? A. I am mixed up already.

Q. Do you occupy or have you occupied any position on any governmental body? A. Well, I don't know what would be your definition of a governmental body—

Q. An elected office? [110] A. Yes, I have been elected to the Williamsburg Community Corporation, I am active there for the last seven years, I have been elected and I am the secretary of the local school board, District 14, and those are the two elective offices that I have held.

Q. School Board District 14, does that coincide with any particular assembly or senate line? A. No, it is just a school district line, it is a different line altogether.

Q. Does the reapportionment as affected by the 1974 Act affect you in any way in terms of political, your own political possibilities? A. Yes, it affects me personally politically.

Q. How does it do that? A. Well, when I decided, when I put forward my candidacy—let's go a little back and give you some background history:

As I told you before, I am seven years on the Williamsburg Community Corporation, and that is a corporation where the Jewish members are outnumbered by three to one or even four to one. We have there Puerto Ricans, Blacks, Italians, Polish, whatever, Irish, whatever. We work there together, and last year when the School Board elections came up petitions were circulated and my name was put forward and [111] I accepted it only on the basis that other than Hasidic or Jewish or whites will support me. I had the full support from the entire Williamsburgh Community Corporation, I had Black people out campaigning for me, I had Puerto Rican people out campaigning for me.

And coming to the Community School Board, I am there as the only Hasidic Jew, we have Puerto Ricans, we have their Blacks, we have Italians, Polish and Irish, and we work very nicely together because the only thing that we have in mind is what is good for the children of our district.

Now having had that experience I was contemplating personally to run for elective office, and Blacks and Puerto Ricans promise me support.

I cannot have that audacity in asking now for their support when I don't have the grass-roots support of my own

people because my own district is split in two. If I had the full support of the Hasidic people, I am sure that I could put up a viable campaign, whether I won or lost, and if I lost I would have lost by a small margin and it would be worthwhile for me politically speaking.

Q. Is it your view in addition that the lines that are drawn will encourage voting on the basis of race? A. It is my—

Q. Is it your view that the lines that are drawn [112] will encourage voting on the basis of race, the lines that have been presently drawn? A. I think that this will bring out, especially after Mr. Schnapper's position here, this will bring out the racial issue, which we didn't, which we were fortunate in not having it in our community, and I am very much afraid that this will become a racial issue now.

Q. Because of the lines which have been drawn on this basis? A. Yes, and because the lines were drawn on this basis on the recommendation from Mr. Schnapper.

Q. Well—thank you.

CROSS-EXAMINATION

By Mr. Schnapper:

Q. Mr. Lefkowitz, I take it that the harm that will occur in terms of your political aspirations is harm caused by these lines because the Williamsburgh Community has been split in half; is that correct? A. That is correct.

Q. If the community were all in one district, even though it might have a majority of Blacks, that would be okay with you? A. No objection at all.

Q. Now Mr. Lewin also raised the question whether [113] the present lines might result in racial polarization voting, and am I correct in assuming that you think that the new lines may result in racial polarization because they split the Williamsburgh community in half; is that the problem? A. No, that wouldn't only be the problem, so to speak, the background of it, what I think the real harm comes from is

to emphasize and to make it a law that it has to be 65 or over other than White, that brings out the racial issue.

In other words, my conception of the Bill of Rights is that a district should be drawn for the community and we should be color blind and to who is the candidate or who gets elected, in other words we should be color blind. What you are creating is a monster. What you are saying is we shouldn't be color blind, we should look whether it is a Black or a Puerto Rican. It is a racial issue and that is unconstitutional, in my opinion.

Q. With regard to the school district of which you are a board member, is that district 14, did I get it right? A. Yes, sir.

Q. Is all of the Williamsburgh community in that single district or are you split? A. It is all in the same district.

Q. One final question with regard to the decision of Mr. Pottinger, the one of April 1st, you are familiar with [114] that? A. Yes.

Q. Had you prior to that decision sent any letters or memoranda personally to the Attorney General urging him to approve the 1972 district lines? A. No, we did not go and we wouldn't have done anything had you not insisted to have at least 65 or more percent of colored or of minority people.

THE COURT: I take it the 1972 lines are the lines before the change.

MR. SCHNAPPER: That is right.

Thank you.

THE COURT: Any further questions or examination of this witness?

MR. ZUCKERMAN: No, your Honor.

THE COURT: All right, you may step down.

THE WITNESS: Thank you.

(The witness was excused.)

[115] MR. LEWIN: We will call Richard S. Scolara.

Richard S. Scolara

called as a witness on behalf of the plaintiffs, having been duly sworn by His Honor, Judge Bruchhausen, testified as follows:

DIRECT EXAMINATION

BY MR. LEWIN:

Q. Mr. Scolaro, how are you employed? A. I am an Attorney and a member of a law firm in Syracuse.

As relates to these proceedings, I am the Executive Director of the Joint Legislature Committee on Reapportionment.

Q. That is the New York State Joint Legislative Committee on Reapportionment? A. Excuse me, the name has just been changed to the Joint Committee, I think they have dropped the word "legislature."

THE COURT: Is this a public appointment?

THE WITNESS: It is an appointment by the members of the legislature who are members of the committee.

THE COURT: I see, it is a committee of the legislature.

[116] BY MR. LEWIN:

Q. And what is the function of that body? A. The principal function on a staff level is to recommend apportionment plans to members of the committee who are legislators and for them to recommend to the full legislature a plan of reapportionment for passage by that legislative body.

Q. The committee has elected you to the staff level, how many members of the legislature are members of that committee? A. There are ten.

Q. And they appoint a staff that does the spade work, the technical work; is that correct? A. That is right.

Q. How long have you been occupying the capacity that you have just testified about? A. I have been involved in

reapportionment since it started in New York State in 1964, that is with this committee in some capacity——

THE COURT: 1964, you say?

THE WITNESS: 1964, I have been with it since 1964.

A. (Continuing) I have been through various positions of Assistant Counsel, Counsel and most recently Executive [117] Director, which I believe hasn't been since 1968 or '69.

Q. And had you had any experience with apportionment prior to 1964? A. No, sir.

Q. Have you been involved in the drafting or evaluation of all reapportionment plans since that time? A. Yes, sir, I have.

Q. What about your capacity with regard to the judicially directed reapportionment under the Orans case in the New York Court of Appeals? A. The Judicial Commission employed the staff of the Joint Legislative Committee, or rather more accurately during that period of time I worked with the Judicial Commission.

Q. So you were involved in drawing up that plan as to the reapportionment in 1966, was it, that is when it was submitted and approved? A. I have been involved with any reapportionment plan that has come into existence that had been prepared since 1964, that is that had been enacted.

Q. And you were involved in as well the reapportionment plan that resulted in the legislation which is an issue in this case? A. Yes, sir.

[118] MR. LEWIN: No just for the record, I think, your Honor, I ought to introduce at this time—well, we did not have these attached to our complaint, but I would like to have this marked as a Plaintiff's Exhibit——

THE COURT: This is for identification?

MR. LEWIN: We will make it for identification.

We can make it a complete exhibit, I suppose.

MR. ZUCKERMAN: What is this?

MR. LEWIN: It is just the bill.

THE CLERK: Do you want these as one or three?

MR. LEWIN: You can make them collectively one exhibit.

THE CLERK: Five separate acts on reapportionment marked for identification as Plaintiff's Exhibit 1.

BY MR. LEWIN:

Q. I show you Plaintiff's 1 for identification.

Now, that is five separate acts, and the ones that are marked S-1, S-2 and S-3, do they comprise the proposals that were submitted by the Joint Legislative Committee on Reapportionment in May of 1974 to the New York Legislature? A. Yes, they do.

Q. And the ones that are marked S-6 and S-11, A-6 [119] and A-11, do they comprise analysis that were made as to those acts.

THE COURT: Let me ask you, the exhibit numbers that you claim was the offering by his Committee, what is that number?

MR. LEWIN: Well, they are all a part of Plaintiff's Exhibit 1, your Honor, there are the first three bills of Plaintiff's Exhibit 1——

THE WITNESS: I can explain all of this.

MR. LEWIN: Why don't you explain those things.

THE WITNESS: We originally——

THE COURT: Is that shown on the paper, who submitted it.

THE WITNESS: These are the bills, all of which were enacted. The original bill, S-1 A-1 bills with——

THE COURT: I'm trying to find out which ones were recommended by your group.

THE WITNESS: All of them.

THE COURT: All of them, I see.

THE WITNESS: At one point S-1 A-1—well, it was the introduction dealing with modifying the assembly and senate lines.

S-2 A-2 dealt strictly with the Congressional Districts, modifying the previously existing [120] Congressional District.

S-3 A-3 is what we consider to be a chapter amendment modifying the original recommendation for Senate lines.

THE COURT: Were those modifications—

THE WITNESS: They were all—

THE COURT: (Continuing) —offered by your group.

THE WITNESS: The modifications were brought to the attention of the Committee by members of the Legislative Committee; the Committee then did the work and submitted back groups of proposed bills to the Legislative Committee, and then the Legislative Committee introduced those bills to the Committee on Rules.

THE COURT: What date was this?

THE WITNESS: This was May the 29th, they were all done on May 29th.

A. (Continuing) Now S-6 A-6 modified the S-1 dealing with the assembly district lines.

S-11 A-11 was a modification of the senate district lines and was employed by us solely because of errors that were committed in the Fifth Senatorial District, and those errors had to be corrected and S-11 A-11 does [121] nothing more than correct that error.

Q. Do all of the bills that are together as Plaintiff's Exhibit 1, do they constitute the full 1974 modification to the earlier reapportionment in 1972, the 1972 reapportionment. A. Yes, I believe they do.

Q. And that is the packet of bills that was submitted to the Department of Justice on May 31, 1974, for approval? A. Yes, sir, it was.

MR. LEWIN: All right, we will offer that in evidence.

MR. ZUCKERMAN: No objection.

(Above documents marked as Plaintiff's Exhibit 1 in evidence, as of this date.)

[122] By MR. LEWIN:

Q. Now, directing your attention specifically—well, I would like to show you what has been deemed marked as Plaintiff's Exhibit 2 for identification which are three maps headed, "1974 Assembly"—I'm sorry, "1974 Borough of Brooklyn Assembly";

"1974 Borough of Brooklyn Senate";

"1974 Borough of Brooklyn Congress." A. I don't understand what the red markings are, I assume they are the Chapter Amendments.

Q. I think they are, we took the red markings off the copy that the Department of Justice had? A. Okay.

Q. The best we can trace them is that they are amendments to the chapters, the Chapter Amendments? A. That is correct.

The maps were prepared based on S-1 A-1, S-2 A-2, S-3 A-3 and submitted to all the members of the legislature.

The Chapter Amendments occurred subsequent to the publication of the maps and therefore the maps you submitted to me in the original print are not the final bill but modified by red lines over the black lines, and they would be the enactments.

[123] MR. LEWIN: May we have Plaintiff's Exhibit 2 for identification received in evidence.

THE COURT: All right, mark them.

THE CLERK: Map of the Assembly Districts received in evidence as Plaintiff's Exhibit 2.

Map of Senatorial Districts received in evidence as Plaintiff's Exhibit 2A.

Map of Congressional Districts received in evidence as Plaintiff's Exhibit 2B.

By MR. LEWIN:

Q. Now the area which we have been talking about in this litigation I think is one that you are familiar with: right, Mr. Scolaro? A. Yes sir, I am familiar with it in-

sofar as the Hasidic Community is concerned, I am familiar with where they reside.

Q. Since the time that you have been involved with reapportionment in New York State, that geographic area has been in the same senate and assembly districts? A. To the best of my recollection it has been in the Williamsburgh area.

Q. And for purposes of apportionment plans that you had occasion to draw up during those periods of time, did you and the members of the staff of the Joint Legislative [124] Committee consider it as a single unit that should not be divided up? A. It certainly was considered as a community in drawing the plans previously, and if I may have the opportunity of explaining a little how reapportionment has been done traditionally, that is prior to 1974, we have always considered the natural geographic boundary to be the rivers in the Brooklyn area and to the extent possible we have always tried to deal with the periphery initially and move in towards the center of the community.

THE COURT: Just in summary, is it your position through these exhibits that you wanted to retain the lines.

THE WITNESS: I am not sure what you mean, my position to retain the old lines?

THE COURT: Was it the position of your group to retain the old lines?

THE WITNESS: My group only functions to reapportion, we are the staff of the committee which is charged with the responsibility of reapportionment.

THE COURT: I'm just asking what your function was, what did you do; did you recommend any changes or did you substantially retain the old lines from 1972?

[125] THE WITNESS: At the request of the Department of Justice—at the request of the legislative leaders we as a staff attempted to defend the '72 lines with the Department of Justice and on various occasions we met with them in an attempt to defend those lines.

The defense was of no avail.

BY MR. LEWIN:

Q. In the history of your dealings with the problems of reapportionment in New York, has there ever been an occasion where your committee has deliberately racially gerrymandered a district? A. There was a proceeding in the State Court dealing with the question of racial gerrymandering the last time around and the Court found there was no evidence of racial gerrymandering at a state level, even though that issue was not presented to the Court in the same manner that this issue is being presented, but it was not found.

Q. It was never purposely racially to gerrymander any district? A. There was never any particular purpose to gerrymander racially.

Now I have heard three different definitions of gerrymandering today, I am not sure I ascribe to any of those definitions, but in my own definition I don't [126] believe that was the particular purpose, that is to racially discriminate against any particular group, any ethnic group.

Q. Now that series of bills and maps that you have before you was proposed by you and enacted to replace the 1972 reapportionment; is that right? A. Yes, sir.

Q. And which the Department of Justice found invalid? A. The '72 lines, yes, sir.

Q. The '72 lines? A. Yes.

Q. Those '72 lines were not drawn with any purpose to disenfranchise minority races, were they? A. The State Court I believe has found that to be true.

Q. And you argued that with the Department of Justice, at the meetings you had with them? A. Yes, in fact we argued specifically that Hasidic problem, I think that has been pointed to a certain degree, and Mr. Pottinger was not involved in that nor was Mr. Turner, he was not involved with any of those arguments, initially other staff people were and we specifically pointed out that because of the areas that they were [127] questioning as to the make-

up of the ethnic population, and this is what they were questioning, conceivably we told them we would have to divide up other groups that were traditionally known as minority ethnic groups in order to comply with the new request being made by the Department of Justice, and the question of the Hasidic Community was specifically raised.

Q. It was raised with the Department of Justice? A. Yes, sir.

Q. And what was the response you received from them? A. It is very difficult for me to be articulate on this because of a sort of—well, let me tell you their position, their position was this:

What you have got now is not good because the affect of what you have got is to discriminate racially against non-whites, and what they suggested is that the lines be amended so that in certain areas such as in Brooklyn you should consolidate the Black areas, that is put some additional Blacks into adjacent White areas in order to affect the possibility of greater Black representation in districts that are adjacent to those districts presently being represented by Blacks.

Now, that argument with respect to Brooklyn [128] was just the opposite of that in Manhattan. There they took the position that we had overdiluted the Black population and as a result we should attempt to take the Black populace out of the White areas and create more substantial majorities in the Black districts within Manhattan, and that particularly in the senate districts of Manhattan.

Q. Now, those were discussions that you had with the Department of Justice after April 1st of this year? A. The discussions started in the defense of the lines prior to their determination, and it resulted in two trips to Washington, one of which I think we were there for five or six hours and was strictly in an attempt to defend the '72 lines and which we considered to be appropriate apportionment and should not be modified.

[129] Q. So there were two meetings which you had prior to April 1st of 1947? A. There were at least two meetings, one in particular which was pretty much an all day meeting where we got into the nuts and bolts of the questions, going on a district by district basis and trying to defend each thing that we had done in 1972, and at that time, we were also considering the Bronx County in addition to Manhattan and Queens.

Q. You tried to defend the lines on criteria other than racial criteria? A. We attempted to defend the lines as being in compliance with the Voting Rights Act and we felt that they were in compliance with the Voting Rights Act and should not be modified.

Q. And you felt that they did not deprive anyone on account of race, creed or color? A. Yes, sir.

Q. And they were justified by other considerations in each instance such as nationality, geographic boundaries, community units, and what other factors? A. Well, pretty much as you have described it, we had always attempted to maintain a community of interest, the socio-economic community of interest or the [130] religious community of interest, and we always tried to have our principal lines run along main arterial lines or of any major arterial highway.

We have always attempted to comply and were trying to follow other district lines to the extent that we could, and that is relatively a shallow argument, because if you were to interpose certain criteria on the map, you would end up with a totally black map.

We have attempted, however, in the framework of the staff, to maintain existing cultural, socio-economic or ethnic groups in one district to the extent possible.

Q. Specifically, in discussing the matter of the racial distribution of a minority racial population, and I am directing your attention to Assembly District 57, was there any discussion of the percentage of the non-white population in Assembly District 57 under the 1972 Reappor-

tionment? A. Yes, sir, there was specific, and I think in the April 1st decision signed by Mr. Pottinger, the 57th District was one of the districts which were pointed out to be adjacent to a non-white area or a black-Puerto Rican area.

Q. It is a fact, is it not, that according to [131] the 1970 census, the 57 lines, the 57 assembly district lines meant that that district had a population, a non-white population of about 61.5 percent. A. That was our figure.

Now if I may, there was a great deal of discussion with respect to the public census figures, and in noticing some of the census publications around here, I think it should be pointed out that some of those figures are incorrect.

They were published prior to the time that the reworking with the people in the State of New York and our staff was done.

One of the problems that we had was that in the census form that was used by the Bureau of Census, the question of the Puerto Rican population was not clearly identified. It was set forth in those cases—well, the question was asked in such a manner that the members of the Puerto Rican community listed themselves as being whites without a challenge in any way, and I don't mean that in any invidious sense, and it was therefore necessary in dealing with the classification of white and non-white, to determine where the Puerto Ricans would fit into that type of category, white, non-white and three different formulas were employed, the formula that was accepted by [132] the Bureau of Census in dealing with them, and by the Justice Department, resulted in a finding that under the '70 lines, there would be 61.5 percent non-white population in the then 57th District.

Q. I believe we were at the point where you were testifying about the 61.5 population in the 57th Assembly District as it stood on the 1972 reorganization and you said that was an inadequate or was inadequate from the point of view of the department of Justice.

Is that right? A. Yes.

[133] Q. Now, after Mr. Pottinger's letter of April 1 of 1974, did you, first, asking you about yourself, did you form any opinion regarding the validity of the position taken by Mr. Pottinger of that letter? A. Yes. I thought his decision was unwarranted—

THE COURT: That gentleman was who?

Mr. LEWIN: Mr. Pottinger.

THE COURT: Who did he represent?

Mr. LEWIN: Department of Justice, Assistant Attorney General.

Q. You were saying? A. It was unwarranted, personally, as an individual and an attorney.

I thought his decision was unwarranted and was not in compliance with the statute.

Mr. SCHNAPPER: I don't know whether Mr. Lewin intends to continue this line of questioning, but I don't think this witness is here as an expert on the law.

THE COURT: Well, let us say he disagreed with him.

Mr. SCHNAPPER: I think we can voice our disagreements as lawyers but not as witnesses.

THE COURT: All right.

[134] Q. I was asking that as a preliminary to another question, Mr. Scolaro: Did you also canvas the views of the legislators who were members of the Joint Committee on Reapportionment regarding the validity of that legislation? A. I, personally, did not.

Q. Did the staff do that? A. No. That is not a staff function, and they have never been.

Q. Did the Joint Committee on Reapportionment ultimately, in a report, state what its view were regarding that decision? A. Yes.

Q. And were those views in accordance with the views that you have expressed here? A. Yes, sir. I believe substantially they were.

Mr. LEWIN: I show you what I will have marked as Plaintiffs exhibit 3.

THE CLERK: Special report of Joint Committee on Reapportionment marked Plaintiff's exhibit 3 for identification.

(So marked.)

Q. That report, plaintiff's exhibit number 3 was a report that you had a hand in? A. I prepared the report in its official draft, [135] yes, sir.

THE COURT: This is the report of what, your group? A. The interim report on Joint Committee on Reapportionment.

THE COURT: I am a little confused. Is that the Joint Committee of the Legislature?

MR. LEWIN: Yes, sir, on Reapportionment.

THE WITNESS: There are 10 members of this committee and I think it is important to point out that 8 members signed the reports and two did not.

This is not an executed copy.

The two people that did not sign this report were Senator Straub and Assemblyman Fortune.

Q. Senator Straub is Senator Chester Straub? A. Yes.

Q. He is a State Senator for the State Senatorial District in which the Hasidic community was located?

A. He is the State Senator from the Greenpoint area. Yes, sir.

Q. That included that part of the Williamsburg area?

A. I believe it did.

[136] Q. The reason he didn't sign it is that that reapportionment was doing away with his district.

Isn't that right? A. I really can't speak for him. I think personally he had the objection because his district was divided substantially. He did voice also, in a committee meeting that he felt that there should be more recognition given to what he defined his community of interests were then in his existing district.

Q. His failure to sign was not a disagreement with the legal judgment which you say you formed and apparently

8 members of the committee formed, that the Assistant Attorney General was wrong in his decision on the '72 reapportionment?

In other words, Mr. Straub was not, by refusing to sign that, saying that I disagree with you when you say that the Attorney General was wrong and should be taken to court? A. I really can't speak for him on that, but it is accurate to indicate that his principal criticism was the manner of districting.

MR. LEWIN: I offer this in evidence.

MR. SCHNAPPER: I don't know how long this is going to go on—

[137] THE COURT: I cannot hear you.

MR. SCHNAPPER: I want to object to this series of questions suggesting that the Court should consider on questions of law as a public opinion, and I don't see how the legal opinions of the members of legislature are relevant.

MR. LEWIN: If the members of legislature were strong-armed, as we submit they were, into changing these lines, by the fact that the Department of Justice was saying that you have got to change those lines, and the only reason they did not take the Attorney General to court was that there was no time, then I think that is relevant.

Moreover—

THE COURT: Objection overruled.

Proceed.

Q. Well—

MR. LEWIN: I offer this in evidence.

THE COURT: Any objection?

MR. ZUCKERMAN: No objection.

THE COURT: Mark it.

THE CLERK: Document previously marked as Plaintiff's exhibit 3 for identification now received in evidence.

[138] (So marked.)

Q. The report does say, the bottom of the page, page 2, on top of page 3, that the Joint Legislative Committee on Reorganization does not subscribe to the ruling of the Justice Department as expressed in the April 1 letter of the Assistant Attorney General Pottinger, the exigency of time require that new legislation be enacted to satisfy immediately the objectives of the Department of Justice and thereby permit an orderly, primary and general election to take place in New York and Kings County in 1974.

The necessary remedial legislation must be enacted in time to obtain Department of Justice approval prior to June 17, which is the first date at which designated petitions may be circulated for the 1974 primary elections.

Now, is it fair to say—

THE COURT: That primary election is in July?

MR. LEWIN: It is in September.

THE COURT: All right, September.

MR. LEWIN: September 10th.

Q. Is it fair to say that what this report essentially indicates is that the Joint Committee on Reorganization or reapportionment, is really forced to the wall by time, and that was the only reason that they [139] adopted these lines? A. It is clear that we were forced to the wall by reason of time.

I really cannot speak for the legislature on all the reasons they adopted these particular lines as against orders.

Q. Was there any consideration, though, after April 1 of 1974, in attempting to meet the Department of Justice standards?

Was there any consideration given to factors other than race? A. Yes, there was, and I think the succeeding paragraph on page 3 indicates that.

We attempted to effect compliance with the April 1 determination and still maintain compliance with our State Constitutional question with the compactness, black on the border, changing of as few districts as we considered

necessary in order to effect compliance, which we determined to be invalid.

All of those considerations were of great importance to us, however, as occurred previously, and we have had Federal and State criteria to follow, we did accept Federal criteria under the supremacy clause and it would be paramount and therefore to the extent that the [140] Justice Department determination was correct and we felt required to follow their criteria officially, and then attempt to apply Article 3 criterion, secondarily.

Q. Your first effort was to meet the standards that the Department of Justice laid down with regard to race? A. Yes.

Q. Now, specifically page 5 of that report says with regard to Kings County Senate, to overcome Justice Department objections, the committee has attempted to create three senate districts which contain substantial non-white majorities. That is what you were talking about when you said that was your first consideration to create three senate districts with substantial non-white majorities?

A. Yes. We did attempt to create three senatorial districts having substantial majorities of what the census bureau and Justice Department would consider non-white residents.

Q. Did you have any discussion with the Justice Department after April 1 of 1974, to determine what they meant by substantial non-white majorities? A. Yes.

Q. In person? A. Yes.

[141] Q. How many occasions? A. One very lengthy meeting in person and telephone calls and other representatives at my request from my staff did go to Washington on, I believe, one and possibly two other occasions.

We continued to supply data to them, voluminous amounts of data.

Q. There was—this was after April you continued to supply data? A. Yes.

Q. Did you also speak—Did you personally speak on the telephone with attorneys of the Department of Justice? A. Yes.

Q. On how many occasions? A. I cannot pinpoint that, but a sufficient number so that I came to the conclusion that I had learned everything I could possibly learn and had to go on with my task of getting these lines done before June 1, so that they could get the decision back to us by June 10th.

Q. Why did you think they could get a decision by June 10th? A. Because I was told of the substantial amount of material that we had supplied the Justice Department [142] with prior to April 1 which would fill two filing cabinets, I believe, with all data in absolute terms and percentage terms, and at one of my meetings with them, I indicated it was going to take us as a staff, X amount of days to get the work done before we presented it to the committee, and would that be sufficient for you to render a decision prior to June 17th.

While they would not guarantee us a specific date, they indicated, they anticipated they could finish their work once submitted to them, with an approximate estimate of—within approximately 10 days, and I asked them if we got the material in by June 1, could we have it back by June 10th with a decision.

They indicated they thought that would be probable and they still had statutory requirements and their own regulation requirements as to public hearings in notifying people who had objection, but they felt they would be familiar with the issues in those three counties to allow them to make a decision within 10 days.

That has not been the case.

They have not made a decision yet.

Q. And it is now June 20th?

Q. And it is now June 20th? A. Yes, and I called them frequently.

Q. In fact the information was arrived at on [143] May 31? A. It went down immediately after the Governor signed the bill.

Q. I was asking you whether you had discussions as to what constituted substantial non-white majorities.

Were you ever given a specific figure by the Department of Justice? A. No.

Q. Were there times in the course of your discussions with them when you proposed to them certain lines that would result in certain figures of non-white population, in particular districts? A. Yes.

We were very pressed for time at this point.

One of my principal reasons to go to Washington after the decision is that the letter does not say anything to be of a guideline to a staff.

I told them that you told us what we have got is bad. I said give us an indication of what would be good.

I suggested to them one thing that might be helpful was to give us what you considered to be a substantial non-white plurality that we might incorporate to [144] draw new lines.

They refused.

I suggested then the existing 57th District, 61.5 percent is a figure all parties agree upon and you determine that is not substantial by indicating that would be one district which could be improved by a greater number of non-majority whites and their indication, without statement, was that the 57th District was not sufficient to be classified as a non-white district.

I said how much higher do you have to go?

Is 70 percent all right?

They didn't say yes or no, but they indicated it is more in line with the way we think in order to effect the possibility of a minority candidate being elected within that district.

I suggested 65 percent. It came out at that time that is a figure used by the NAACP in numerous briefs and other documents.

I got the feeling, and I cannot vouch for this as a matter of having been specifically said, but I left that meeting indicating that 65 percent would be probably an approved figure.

Also, that 70 percent, certainly would be.

But a minor difference of 63 from 61.5 would [145] not be sufficient, and I buttressed that feeling on the fact that I argued prior to April 1 that the district percentages they were using were based on a census effective April 1, 1970.

THE COURT: When you speak of that, you speak of non-whites?

THE WITNESS: Yes.

They classify populations in three categories: White, non-white, which includes Puerto Rican and black and other and the other is a minor classification which is basically Eurasian and/or Chinese and not significant in this issue today.

I argued strenuously prior to April 1, that 61.5 percent was the April 1 makeup of the 57th District, and I argued this with respect to the other districts.

The best projections available would indicate their figure would be greater in 1974.

In arguing that and still having been told we had to improve the district lines, I thought it was logical for me to assume anything under 65 would not be acceptable. [146] Q. Was there ever any discussion of any particular plan that would involve the figure in the neighborhood of 63.4 or 63.7? A. No. At that time I did not anticipate that one of the plans that would have been given serious consideration would be a plan that would have generated a 63.4 percent for the 57th Assembly District.

Q. You thought that would be rejected? A. Yes.

Q. Page 7 of your report also indicates that as the Kings County Assembly, the Justice Department determined that it was necessary to obtain two additional Assembly Districts with substantial non-white population.

A. Again the Justice Department didn't specifically state we want you to create 7. The content of their letter led us to the conclusion that 5 was not enough, and based on the proportion of blacks and Puerto Ricans as compared to the white population in the adjacent district a very logical conclusion would be that at least 7 should be created.

Q. Your report says that 5 districts in the Kings County Assembly of the total of $21\frac{1}{2}$ were represented by non-whites at that time? A. Did you say $21\frac{1}{2}$?

Q. Is that right? [147] A. There are 22 Assembly Districts in Kings County and of these, five were represented by blacks and six had over 60 percent black population and one had a population of between 50 and 60 percent black based on 1970 figures.

Q. When you say 22 Assembly Districts, 21 and one being partial? A. That is correct.

Q. And of the total population of Kings County what percentage approximately of the total population was black, according to the 1970 census? A. It is open to great dispute but I believe it is approximately 400,000 out of 2.1 million. And I will stand corrected on that, is black. I believe that is a correct figure. I cannot—well, I haven't committed it to memory.

MR. SCHNAPPER: We will correct that on the record later on.

MR. LEWIN: Can I have an approximate figure?

MR. SCHNAPPER: We will have to check. My memory is that it is several hundred thousand larger and that the total non-white population is approximately $35\frac{1}{2}$ percent of of the county as a whole.

Q. Were there any Puerto Rican members in the Assembly from Kings County? [148] A. No.

Q. We are talking about five black Assemblymen—can we have an approximate percentage for the black population in Kings County?

MR. SCHNAPPER: I would guess it is 25 percent black and 10 percent Puerto Rican.

MR. ZUCKERMAN: I think that is large.

MR. LEWIN: 22 percent to 25.

Q. Was there any discussion with the Department of Justice as to whether it was that they concluded that with the 22 to 25 percent black population in Kings County representation by five black Assemblymen out of 21½ Assembly Districts was not prorated to the population? A. Yes, but in a different vein.

It was by reason where the black and Puerto Rican population resided. It was in a heavy consolidated neighborhood in the Bedford-Stuyvesant area. They felt the district as they existed was so substantially an overwhelming not white district that the effect of such districting clearly diluted the representation of the black community and in speaking with them they indicated that those districts which were so substantially non-white should be diluted and part of the non-white population should be placed in adjacent districts in order to affect greater population.

[149] At no time did the Justice Department indicate something like proportional representation, that since there are 25 percent black that they should have 25 representatives. It was more of a functional number residing in one specific area.

Q. Was there any discussion of separate Puerto Rican representation and the adequacy of that? A. Not to my recollection.

I am sure the issue was raised, but at most of my discussions I only seem to recollect breaking down to two categories, a minority being non-white and white being a majority.

Q. And a third category for other, non-Caucasian, non-black, non-Puerto Rican? A. Yes.

Q. Earlier today I showed you, I believe you said you hadn't seen them, but I showed you the complaint in this

case and specifically Paragraph 13 where it is alleged that the conclusion of the Attorney General or Mr. Pottinger was based not on any finding of evidence or lack of evidence tending to establish that there was purposeful racial gerrymandering designed to reduce black representation in the State Legislature when the 1972 re-apportionment and the 1966 re-apportionment was drawn.

[150] From your understanding of conversations with attorneys in the Department of Justice is that allegation true? A. Yes. They said the effect was to dilute the minority representation.

Q. That is Paragraph 14? A. Yes.

Q. Paragraph 15 says the Attorney General did not rest on any finding, evidence, or lack of evidence, tending to show there was a history of past official discrimination against the black electorate of Kings County only corrected by deliberate maximum of black voting strength in elections held in '74. Is that also true?

MR. SCHNAPPER: I object. We don't have to resort to Mr. Scolaro's opinions as to reasons.

You have a copy of the report, your Honor.

MR. LEWIN: The representative of the Attorney General spoke with Mr. Solaro.

MR. SCHNAPPER: That is double-hearsay.

THE COURT: Overruled.

Q. What allegation—well, what about allegation in Paragraph 15? A. At no time did any member of the Attorney General's staff indicate their decision was based on any past history of discrimination.

[151] Q. Paragraph 16, did they indicate to you in any way that there was anything other than the fact that it was possible to draw district lines which would create substantial, the complaint says black, read for black, non-white majorities? Is that true? A. I believe that comes out of the determination letter of April 1.

In my conversation with them they did not indicate that would be the only manner in which to effect compliance. They left that up to us, how to effect it.

Q. Read Paragraph 17. That refers to what you concluded, what you were told by attorneys in the Department of Justice and for black, read non-white? A. I believe that is valid.

Q. Paragraph 18. A. I am sorry, I cannot respond to that. I don't know what the majority of the Legislature felt. I certainly don't know the basis for the Governor's decision.

Q. Let us take 20.

We are referring to your actions in May after April 1 of 1974. A. The second sentence is clearly true. I do not feel the first sentence is entirely correct. We were guided by racial criteria in the determination of the U.S. Attorney but we certainly had other criteria which we considered as substantial, provided it didn't conflict with a supremacy provision.

Q. I think you testified the first is the first objection and principally you should read that, meaning principally in its literal sense.

When you set down in 74 after April 1 of 1974, that letter, you saw your first task being guided by questions of race, achieved certain standards that the Department of Justice laid down on that subject? A. We have a semantic problem. Clearly I felt that unless we apply the criteria established in the April 1 determination letter and set forth in the discussions I had with the Justice Department that we would never prevail and never get compliance. I am concerned with using the word principally. I was concerned with my state constitutional requirements also.

Q. You viewed your first task to get a specific number of non-white residents into these districts in certain senatorial and assembly districts? A. Yes.

Q. You mean districts less than 65 percent—more than 35 percent whites? A. Yes.

[153] Q. 21. A. I think the intent of it is correct.

The term several meanings may connote something more than what is true.

Q. You have forgotten the number of meetings you had? A. Definitely. They were cooperative and we would meet whenever they felt we could do something.

Q. You went over perhaps district by district? A. The meetings prior to April 1 we went over the 1972 district lines with them district by district in order to attempt to support those lines.

Subsequent to April 1 our meetings fell strictly with the issues in which we could effect compliance.

To this day, I had not gone over the 1974 lines with the Department of Justice district by district.

Q. The Justice Department is interested in '72 in hearing your explanation district by district? A. Yes.

Q. What did you talk about for five hours at that first meeting? A. Well, at that time it was our role to attempt to defend the '72 lines.

Q. I am sorry, I misunderstood you. I meant after [154] April of 1974. Did you have a long meeting with them after April of '74? A. The meeting after April 1 of '74 I think was about two to three hours and part of that time—the length of that time was increased by reason of meeting with different people at different times. We met with Mr. Turner, Mr. Jones and Mr. Selden and staff people and we attempted to more clearly define the guidelines that we were going to be required to employ. Our product, to the best of our knowledge, is the result of the guidelines that were at least inferred to us.

[155] Q. Let's go on to paragraph 22. A. Based on the determination that the 57th, as it existed after the 1972 apportionment was invalid, could not be—would not be considered a non-white district, it was clearly our opinion that the 55 to 60 percent would not be sufficient.

I think I have already answered the issue on how 65 became a number.

Q. Right.

How about paragraph—first sentence of paragraph 27?

Maybe I ought to put the question another way. If not for the race—for the race-conscious policy dictated by the Department of Justice, would your committee in any way have considered the segmentation of the Williamsburgh Hassidic community? A. We reapportioned in 1972, and clearly in 1972, we maintained that Hassidic community was a single entity within a district. At that time, we were aware of where the Hassidic community was. We were aware of it this time. We did not feel in 1974 that we could effect compliance because of the periphery population and the makeup of the periphery population of the 57 without dividing the Hassidic community.

Q. So that your reason for dividing the Hassidic community was to effect compliance with the Department of [156] of Justice determination, and the minimum standard they impose—they appear to impose? A. That was the sole reason. We spent over a full day right around the clock, attempting to come up with some other type of districting plan that would maintain the Hassidic community as one entity, and I think that evidenced clearly by the fact that that district is exactly 65 percent, and it's because we went block by block, and didn't go higher or lower than that, in order to maintain as much of the community as possible.

MR. LEWIN: That's all.

CROSS EXAMINATION

BY MR. ZUCKERMAN:

Q. Mr. Scolaro, one of the plaintiff's witnesses testified earlier today, that he believed that there might have been some animosity on the part of the Legislature for the Joint Committee on Reapportionment in dividing the Hassidic community in Williamsburgh.

To your knowledge, was there any attempt to obtain any form of revenge against the Hassidic community, or did anyone express any animosity to the Hassidic commu-

nity in Williamsburgh? A. Clearly, that's not true. There certainly was no animosity.

As a matter of fact, all segments of the Legislature, [157] clearly indicated to the staff of directing us to attempt to retain the Hassidic community as a community, and I think with the number of man-hours that went into attempting to reunite the Hassidic community, and still effect compliance, the good faith of the Legislature has been clearly demonstrated. Everything we attempted to do was just the opposite of that.

At the legislative level, we attempted very, very clearly to maintain the Hassidic community as a single community, and in fact did so, in two other areas in Brooklyn.

Q. Those areas were in Crown Heights and Borough Park? A. Yes, sir.

Q. So then the division of Williamsburgh was done strictly and solely to satisfy the demands of the United States Department of Justice? A. Yes. I can—if it will be of any help, I can explain how this all came about. I don't know if that's important.

Q. I think that might be helpful. A. In attempting to reapportion, to offset the compliance, we prepared enormous acetate overlays. The map that we worked on for Brooklyn is approximately 22 feet by 20 feet long. It's a monstrous thing. [158] It's up on a huge table, and three or four people can work on it at one time.

The overlays were prepared in two different colors. Red and blue just happen to be our guide. And block by block and census tract by census tract, we colored in in various proportions the Puerto Rican population, and the black population, all over the area.

The 57 area is totally bordered, by what we consider to be non-white population, except for the Hassidic Jewish area.

This (indicating) whole line, the line between 52 and 57, 53 and 57, and 56 and 57, with the exception of the Hassi-

dic community is not considered to be a substantial white area.

Now, there are variables in here. The Hassidic community that we were dealing with at that time, we were very much aware of it, was the area bounded by initially Marcy Street—Marcy Avenue, excuse me, down to approximately Lynch, I believe.

Now, that population is there, according to our statistics, which is a merger of the first and third County census tapes, was approximately 11,500 or 12,500 people. It was in that area. One hundred percent white on any census map. Every other peripheral area was no better than [159] thirty percent non-white.

To move 11,000 people out of the 56th and back into the 57th and still comply with one-man, one-vote, of having identical population in the adjacent districts, and our own block on the border problems, we would have had to have taken 11,000 of the exact number of whites out of the 57th and replaced them either in the 56th or in one of the other adjacent districts.

The population would have to be equal, but the white population going in would have to be equal to the White population going out.

The principal area that is white and totally white in the 57th was in this area right here (indicating).

Q. Could you describe geographically, you pointed to the western—southwestern extremity?

Rather, the—perhaps by streets, because the testimony won't pick up what, on the map, you are pointing to. A. Yes. These maps are very difficult to read, but it would be substantially the area on the map, immediately west of the number five, in running north and south of the number five. There are probably other people in this room who can testify to that better. In this area (indicating).

It would be more in the western portion, but not on the line of the 57th district, because the line is not [160]

considered to be under census criteria one hundred percent white, as is the Hassidic community.

My problem, and our problem in doing this is, in order to get into what would be considered a white area and remove that white area out of the 57 district, so that it could be replaced with a Hassidic community, we had to go along the line. We had to go up into that area by going to the periphery of the existing line.

In doing that, we automatically picked up non-white population, and no matter how hard we tried and came up—and the people that were there working with us, could also indicate this—we came up with probably ten or twelve different ideas. We put them all through computer analysis. We applied block on the border.

The best district we could come up with by replacing the entire Hassidic community in the 57 district, would be a district of approximately 63.4 percent non-white, and it was our determination at that time, after all of our consultation with the Justice Department, that increasing a percentage from 61.5 to 63.4, would not be acceptable to effect compliance, and so, those changes, required changing six districts, changing all districts, and it was just an infinite number of ways of doing it, and every way that was suggested to us, and every way we came up with ourselves, never got to 65 [161] percent.

Q. Mr. Scolaro, you have mentioned the block on the border problem. I think it might be advisable to inform the Court, just what is the block on the border requirement, of the New York State Constitution? A. As it pertains to the County of Kings, whenever we are drawing Senate or Assembly lines within a City, the difference in population between two adjacent districts having a common border, can be no greater than the population of the smallest block on that border.

For instance, if you went down Fifth Avenue in New York, you would have—you would go from 14th Street all the way to 160th Street, right on the Fifth Avenue border.

You'd have an East Side and a West Side, so you'd have two blocks for every street that bisected that.

The population of the two districts which are bordered by Fifth Avenue, that are adjacent to each other, can be no greater than the population of the smallest block that's on that same border, and generally when you get into a city like this, you always end up with a zero block, or a one or a two population block, which requires your adjacent districts to be exactly equal in population.

An example would be between the 57th and 56th. This would be the borderline (indicating), this dark black line [162] here.

Therefore, we had to look at the population of every single block that touches that black line, and whatever the smallest population was that we found, that determined the difference in population between the 57 and the 56. And in reading the report, you will, I think now more fully understand why the numbers are so exact. It's because they are required to be exact.

It also, incidentally, is the reason why reapportionment takes forever, because it has to be done manually, and trying to change your population in drawing that line back and forth, takes literally hours and hours and hours. [163] Q. Now, Mr. Scolaro, going back to the discussions with the Department of Justice before their April 1st ruling this—I refer now to a conference in the Department of Justice at approximately the middle of March of 1974. Do you recall trying to advise the staff members of the Civil Rights Division of the Department of Justice of exactly this problem of trying to preserve the Hassidic community in Williamsburgh? A. Yes, sir; and not only there. I think we brought up—we argued very strenuously at that time that we should attempt to preserve the Hassidic community and that any modification of the 57 may result in the Hassidic community not being contained as an integral unit.

At that time we had not drawn any plans because we did not anticipate an adverse decision and as a result may not have—I wasn't in a position to say that you definitely would have to divide the Hassidic community.

But we argued it also with respect to the northern portion, I believe, of the 41st Assembly District and also with respect to the Borough Hall area. Where the Hassidic communities were, to the extent that we had defined them as communities.

Q. Was it your impression at that time that the Department of Justice had any real understanding of the nature [164] of the Hassidic community in Brooklyn? A. Clearly they did not. They were not able to define them.

I think one member could—could define what a Hassidic Jew was or is, but no, they certainly did not have a complete understanding of the problems involved in reapportionment within the Hassidic community.

Q. You also recall one staff member of the Department of Justice, I believe his name was Richard Selton? A. Yes.

Q. Who after studying the maps of Brooklyn for some nine weeks asked us if we could point out where Williamsburgh was on the map of Brooklyn? A. Yes, sir.

As a matter of fact, I think at that meeting he had—he had the Hassidic community in a totally different area.

Q. You also remember the same Mr. Selton asking why there were so few people living in the center of Brooklyn, and we had to explain to him that he was pointing to Prospect Park? A. Yes.

As a matter of fact, one of the objections that they had to the Assembly District as then existed was that the 44th Assembly District was a clear indication of an [165] effect of diluting minority representation because there was no reason to join the area north of Prospect Park with the area south of Prospect Park, and the fact that we had this immense park in the middle was, I assume, was employed by us to disguise adding the real reason

for the north and the south being added together, and we had to explain to them that there isn't much we can do about parks.

Q. I have one final question:

In all your years and work on the Joint Committee on Reapportionment, would you say that after April 1, 1974, for the first time you and the committee made a color-conscious approach in drawing district lines? A. I'm not sure I understand what you mean.

Q. I'm saying, prior to April 1, 1974, had the committee ever intended to maximize or to minimize the number of legislative districts based on race? A. Frankly, it's a whole new ball game to me. We have always reapportioned from the peripheral areas of the geographic communities and worked towards the center.

This is the first time that I have ever been involved in reapportionment where we had this immense reapportionment with a specific ethnic group right in the center of the community in our fall-out areas where non-traditional areas that were on the borders of rivers that [166] were—or other national geographic boundaries.

THE COURT: I think we are getting into repetition.

MR. ZUCKERMAN: Right.

I have no further questions.

CROSS EXAMINATION

BY MR. SCHNAPPER:

Q. Mr. Scolaro, if I might start, let me make sure I have a clear picture here of chronology of events leading to these lines.

On February 1st of this year, you submitted the 1972 district lines for federal approval; is that correct? A. They were submitted by the Attorney-General's Office.

Q. Right. They were submitted by them.

On April 1st, the Attorney General ruled on those lines? A. That's correct, U.S. Attorney.

Q. That's right. He held, as I understand it, that the Senate and the Assembly and the Congressional lines all had the effect of discriminating on the basis of race against non-whites; is that correct? A. In favor of non-whites, I think. Against non-whites? I'm sorry.

[167] Q. The lines discriminated against non-whites, the '72 lines? A. Yes, that's correct.

Q. All right. And thereafter, these lines were proposed by you and enacted by the Legislature in an attempt to comply with the Justice Department ruling? A. That's correct.

Q. Now, Mr. Lewin raised a question about the intent of the Legislature. Did the Attorney General's letter contain a finding that—as to the intent of the Legislature one way or the other? A. No, sir; just said that the effect of what had been done by the Legislature in passing the '72 lines was to racially discriminate against non-whites.

Q. Did not reach the question of intent? A. No, sir.

Q. One way or the other? A. It does not.

Q. Now, are you aware—have you reviewed the entire record that was before the Attorney General when he made his decision? All the materials that were submitted? Did you go in and get copies of everything that came in? A. No, sir, I did not.

Q. So you are not able to testify as to whether or [168] not there might have been evidence of deliberate discrimination presented to the Attorney General, purposeful discrimination? Just in terms of evidence that might have come in? A. I am able to testify that this issue was raised in the state court and in which I played a role and there was a determination that there was not any racial discrimination in the '72 line.

Q. I understand that. But we're now talking about the evidence that the Attorney General had and you are not able to testify that he did not have some evidence or allegations regarding discriminatory purpose? As you say, you didn't look over the entire file? A. I did not look

over the entire file but I still—I did look over some of your submissions, sir, and to the extent that they—some of the material that you supplied can be considered evidence, we have a basic disagreement.

Q. But I take it, our disagreement was that the materials which we submitted took the position there had been deliberate discrimination and you in fact disagreed that that was the case? A. I think your finding indicated that there had not been a—that the result—the result of the reapportionment or the effect of the reapportionment [169] indicated that there was—minority representation had been diluted, but there was nothing in their decision that indicates that there was any purpose.

Q. Or that there wasn't? There is nothing about purpose at all? A. Then we are in agreement.

Q. Okay. Now let me just see if I have a clear picture of the amount of time that was involved here.

THE COURT: Let's not go over the testimony again. We have all heard the testimony.

MR. SCHNAPPER: I'm sorry. I want to get clear how long it takes to prepare these lines because it may be relevant to whether or not interim—

THE COURT: I am just making that observation, counsel. You may disagree with it.

[170] Q. Can you tell me how long it took to prepare these 1974 district lines? A. Two months.

Q. Now, if the Court were to order reapportionment on a different standard, say 50 per cent a non-white district and you have to redraw the geographical Assembly lines and comply with the block on border and other legal requirements, how long would it take you to prepare such lines and, I suppose, how long would be the total amount of time which it would take to enact another district set of lines which were in compliance with a completely different standard? A. Probably six weeks.

I have waited for years to be able to say in a Courtroom that, because so far as I had read, you can do it

overnight. The same argument was made to the Judicial Commission in 1966 and they had to ask for an extension of time, as I recall to the best of my recollection, because it takes an enormous amount of time to put it all together and draw the lines and describe those lines and enclose the lines to make sure that all people are counted, then to draft a bill to comply with it, that is block on border-wise, and it is an enormous task and you are limited by the number of people that can work at one time. Two people will draw the Assembly district lines in Brooklyn, two people may be working somewhere [171] else on the Assembly district lines of Manhattan, but the allegation that was made previously I think was that if it takes two people one hour to draw one Assembly district, then fifty people could draw twenty-five Assembly districts in one hour: that is just not so, it cannot be done.

THE COURT: Counselor, we are at the point where we usually adjourn.

I don't want to hurry you, but how long will you be with this?

MR. SCHNAPPER: I think I am probably going to take about another half hour.

THE COURT: What?

MR. SCHNAPPER: I think about another half hour.

THE COURT: I think we had better adjourn.

Do you have any other witnesses, Counselor?

MR. LEWIN: Your Honor, I have several things, but in terms of convenience of the witness, I think he lives up in Albany and is planning to return.

I will not call, except for one other possible witness, I will not call any other witnesses, there is a matter of timing on this. Further, unfortunately, I have to be back in Washington tomorrow morning and therefore if we were to adjourn this I suppose it would be adjourned until Monday.

[172] I would ask that this be adjourned until Monday and yet because of the urgency of the matter, I would hope

we could terminate the hearing today, I wonder if that could be done?

THE COURT: Well, if you can terminate it within a reasonable time, and I don't want to pressure you, but I have just made my statement on it.

MR. LEWIN: Well, I don't know—

MR. SCHNAPPER: I will endeavor to be as brief as possible under the circumstances.

MR. LEWIN: I don't know—we won't have any other witness.

THE COURT: What?

MR. LEWIN: We will not have any other witnesses.

THE COURT: All right.

CROSS EXAMINATION

BY MR. SCHNAPPER (continued)

Q. Now, Mr. Scolaro, you testified with regard to the problem of the Hassidic community in the 57th Assembly district that you had concluded that it would not be possible to put all the Hassidic community in the 57th Assembly district without violating the Department of Justice orders; is that correct, sir? A. That is correct.

[173] Q. Now, did you consider putting the entire Hassidic community in the 56th Assembly district? A. That was one variable that we came up with, yes, and that would require a moving of a portion of the Hassidic community which is presently in the 57th district, totally into the 56th district, and that would have resulted, to the best of my knowledge, in two districts, both of which would be over 65 per cent non-white, and the 56th district with the Hassidic community in total in that community would probably be close to 76, 77 per cent non-white—

Q. So— A. The only white community in this whole community would be the Hassidic Jewish community, there would be no other whites.

Q. But, Mr. Scolaro, in hindsight, it would have been possible under that scheme to both comply with the Justice

Department 65 per cent standard, if that was their standard, and keep the Hassidic community together? A. Yes, sir, but it was my judgment in trying to apply the Department of Justice overall criteria that that would definitely make no representation for the Hassidic community at all and that it would be such a minority group in an overwhelmingly black area that they would have not had any representation. They would compose approximately 25,000 [174] people out of 121,000 people and 90,000 of those 121,000 or more would be black.

Q. So it was your concern that if the Hassidic community was kept together by being put into the heavily black 56th Assembly district, that because they were white they would not have had as much representation, effective representation, than they might have in a more white district? A. I thought we could still, in effect, have compliance and still maintain to the extent possible the Hassidic community which would have a viable voice, yes, by placing them in the 56th.

Q. You don't mean by just keeping them together, to keep them together in a heavily white district? A. In a district that would be more white than is involved in the 56th district.

I think the 56th, according to a report, is 90 per cent—

Q. I think it is 88 per cent. A. 88 per cent non-white—

THE COURT: We have been through this percentage business time and time again.

You are present as an amicus curiae, and as I understand the rule as it applies to amicus curiae—well, take this off the record.

[175] (Discussion was off the record.)

MR. SCHNAPPER: I just have a few more questions, your Honor.

THE COURT: Yes, all right.

BY MR. SCHNAPPER:

Q. There is one other question about the percentage which I think is important and which hasn't been brought out, and I wish to ask you a question about the Senatorial district:

Would it be, would it have been or would it be possible to redraw the Senate lines so that the entire Hassidic community was within a single Senatorial district and still comply with the 65 per cent requirement? A. You are dealing with such a large number in the Senatorial district, 304,000 people, that I am sure there would be a way; to the best of my recollection, there would be a way of drawing Senatorial lines if you redraw the other lines and you could probably affect compliance.

Q. All right, sir.

And I take it that if a different standard were applied, there would be no guarantee that the Legislature would put the Hassidic community back together or not; that would be up to them.

THE COURT: Of course, I can answer that, I can give you the answer to that.

[175a] MR. SCHNAPPER: OK, thank you.

[176] THE COURT: Well, we have reached the time that we will conclude today, counselor.

Now, you rest, as I take it, the plaintiff?

MR. LEWIN: Yes.

Your Honor, just one matter came up in Mr. Scolaro's examination that I would like to ask the witness one question on.

REDIRECT EXAMINATION

BY MR. LEWIN:

Q. That 63.4 percent plan that was worked out and which you say you decided was too small really to pass the Department of Justice' standard, is that available today?

I mean, you have it down on a piece of paper someplace up in Albany so that it could be produced, if the Court required it? A. I can't really answer that truthfully, but it would be my opinion that it is not available because generally, in order to avoid confusion, we destroy everything that is a part of it. Our experience in the past has been that if we don't, then the wrong maps get out and everybody gets confused.

It could be reconstructed.

Q. It could be reconstructed in less than the six-week period? A. If I only had to draw one district.

[177] Q. That would require just redrawing that one district, and that could be done in a day or two days; is that possible? A. Within two to three days one district could be.

THE COURT: Does that conclude the hearing?

MR. ZUCKERMAN: Your Honor, I have just one question.

THE COURT: All right.

CROSS EXAMINATION

BY MR. ZUCKERMAN:

Q. Were there other communities in the past that have been divided in the drawing of assembly and senate district lines? A. This happens all the time, every single time we have a re-apportionment we have received a great deal of mail, we have litigated this issue many times before. I don't know any way of re-apportioning without dividing communities. For instance, in Brooklyn, we have had testimony as to some 50 different communities. Some people will recall that Boro Park has been divided, I know Brooklyn Heights has been divided in the '72 re-apportionment, the Brooklyn Heights Association was involved in litigation.

Yes, constantly, whenever there has been re-apportionment. There is no way of dividing 2,100,000 people into 22 [178] assembly districts without dividing communities.

MR. ZUCKERMAN: Thank you.

REDIRECT EXAMINATION

BY MR. LEWIN:

Q. But that has never been done, Mr. Scolaro, on account of race, because you didn't have a racial criterion? A. We have never tried to draw districts before in order to guarantee to the non-white population as much representation as possible.

THE COURT: Where do we stand, counselor?

MR. LEWIN: Well, your Honor, I would just like to complete the record, I have three sets of maps of the 1971 or '72 re-apportionment that I think would be useful.

MR. ZUCKERMAN: Why don't you put them in as exhibits?

MR. LEWIN: I am going to put them in as exhibits.

THE WITNESS: Am I excused?

THE COURT: Yes.

(The witness was excused.)

MR. LEWIN: This will be Exhibit No. 4.

THE CLERK: One at a time.

Three re-apportionment maps received in Evidence [179] as Plaintiff's Exhibit 4, as one exhibit, a composite.

MR. LEWIN: Then I have the maps of the 1966 reapportionment of Kings County for the Senate and Assembly, and a large one for the Congress, these are bad Xerox but the originals appear as Volume 17-A of the New York second reporter, but I would like to put in the Xeroxes.

MR. SCOLARO: I have some maps which you may be able to use.

MR. LEWIN: All right, let me put in them, thank you, Mr. Scolaro.

This is '66 Senate and Assembly maps, let's make those No. 5 in Evidence.

THE COURT: Counsel, did you plan to submit any memoranda on this?

MR. LEWIN: Well, your Honor, I was going to get to that next.

THE COURT: It would be helpful.

MR. LEWIN: Yes, sir.

Your Honor, of course the matter of timing is very important, we haven't gotten into the question of relief, the specific kind of order we would like, the relief, the kind of preliminary injunction which we would like.

[180] THE COURT: Well, I'm just inquiring whether you intend to submit a memorandum.

MR. LEWIN: We would like to do so.

THE COURT: How much time would you want on that?

MR. LEWIN: Because of the urgency of the matter, we would like to be able to file everything really by I suppose Tuesday morning.

THE COURT: I won't hurry you, I will just put down whatever time you say you feel you would want.

MR. LEWIN: We would want to hurry things along, we think it is important that it be decided as early as possible.

THE COURT: I will leave it to you to submit your memorandum, I will say that.

MR. LEWIN: If we can schedule it—

MR. ZUCKERMAN: If we can be served, well, whenever we are served I hope to have an answering memorandum within three days after being served.

THE COURT: Well, all right, I don't think there will be any disagreement on that.

MR. LEWIN: It is just as we say, we recognize that the clock is running against us and we are sure that no matter how fast your Honor decides this case, judging by the diversity of views expressed in the [181] courtroom, somebody will take it to the Court of Appeals, and that is going to make it that much later, so—

THE COURT: Well, I don't like to deprive the Court of Appeals of business, I will say that.

MR. LEWIN: So our feeling is that we are going to get it done as soon as possible, and we would hope that if all the other parties in the action are required to file, that they file within three days after our filing, and—

THE COURT: That is understood.

We will leave it that way, then.

So all sides rest and memoranda will come within the time stated.

MR. LEWIS: Fine.

I would also like to then make the '68 and '70 Congress maps as the next plaintiff's exhibit.

THE CLERK: 1968 and '70 Congressional maps received in evidence as Plaintiff's Exhibit 6.

MR. LEWIN: Also the '72 Senate, Assembly and Congress maps as Plaintiff's Exhibit 7.

THE CLERK: So marked as Plaintiff's Exhibit 7.

MR. LEWIN: Also the '74 Senate, Assembly and Congress maps as Plaintiff's Exhibit B.

No, no, I guess these are duplicates.

[182] Now, the only other thing which I would like to submit, just for the convenience of the Court, I suppose, is one major contemporary study of the Hassidic community by Solomon Poll.

THE CLERK: So marked.

MR. SCHNAPPER: We would like to submit by tomorrow afternoon some of the material which was submitted to the Department of Justice by the State and ourselves, it is important background, I think, to what went on.

MR. LEWIN: Sure, we have no objection to that.

THE COURT: You have no objection to that.

That concludes your presentation, gentlemen?

MR. ZUCKERMAN: Yes, your Honor.

MR. SCHNAPPER: Yes, your Honor.

THE COURT: Thank you.

* * * * *

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Plaintiffs' Exhibit 1

STATE OF NEW YORK

S. 1

Extraordinary Session

SENATE—ASSEMBLY

May 29, 1974

IN SENATE—Introduced by COMMITTEE ON RULES
—(at request of the Joint Committee on Reapportionment)—read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of the Joint Committee on Reapportionment)—read once and referred to the Committee on Rules

AN ACT

To amend the state law, in relation to certain assembly and senate districts and to repeal the descriptions relating to such districts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known as the "Reapportionment Compliance Act of nineteen hundred seventy-four", and its purposes are to effectuate compliance with the determination of the United States Department of Justice dated April first, nineteen hundred seventy-four, and to comply with sections four and five of the Voting Rights Act of nineteen hundred sixty-five insofar as applicable.

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.

§ 2. The descriptions of the forty-fourth, forty-seventh, forty-eight, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, fifty-fifth, fifty-sixth, fifty-seventh, fifty-ninth, seventieth, seventy-first, seventy-second, and seventy-fourth assembly districts contained in section one hundred twenty-one of the state law are hereby repealed, and new descriptions of such districts are hereby inserted therein, in lieu thereof, to read, respectively, as follows:

44. FORTY-FOURTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Parkside avenue intersects Ocean avenue, thence along Ocean avenue to Woodruff avenue, to East Twenty-first street, to Caton avenue to Flatbush avenue, to Martense street, to Bedford avenue, to Snyder avenue, to Flatbush avenue, to Stephens court, to East Twenty-third street, to Farragut road, to East Twenty-second street, to Foster avenue, to East Nineteenth street, to Glenwood road, to East Eighteenth street, to Foster avenue, to Argyle road, to Glenwood road, to Coney Island avenue, to Ditmas avenue, to East Third street, to Cortelyou road, to McDonald avenue, to Ditmas avenue, to Dahill road, to Thirty-seventh street, to Fifteenth avenue, to Dahill road, to Caton avenue, to McDonald avenue, to Greenwood avenue, to East Second street, to Caton avenue, to East Fifth street, to Prospect expressway, to Greenwood avenue, to Prospect park southwest, to Prospect park west, to Sixth street, to Eighth avenue, to Fifth street, to Seventh avenue, to Sixth street, to Sixth avenue, to Fourth street, to Seventh avenue, to Third street, to Sixth avenue, to Union street, to Seventh avenue, to Berkeley place, to Grand Army Plaza west, to Lincoln place, to Eighth avenue, to Flatbush avenue, to to Sterling place, to Vanderbilt avenue, to Grand Army Plaza east, to Eastern Parkway, to New York avenue, to Malbone street, to Clove road, to Empire boulevard, to Nostrand avenue, to Montgomery street, to Rogers avenue, to Empire boulevard, to Ocean avenue, thence along

said avenue to its intersection with Parkside avenue, the point of beginning.

47. **FORTY-SEVENTH DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where Nineteenth avenue extended intersects the waters of Gravesend Bay, thence northerly along said avenue extended and said avenue, to Benson avenue, to Eighteenth avenue, to Eighty-sixth street, to New Utrecht avenue, to Eighteenth avenue, to Seventy-sixth street, to Nineteenth avenue, to Seventy-third street, to Twentieth avenue, to Seventy-second street, to Nineteenth avenue, to Bay Ridge avenue, to Seventeenth avenue, to Sixty-seventh street, to Sixteenth avenue, to Sixty-third street, to Twenty-first avenue, to Sixty-second street, to Bay parkway, to Sixty-fifth street, to West Fifth street, to Avenue P, to Dahill road, to Avenue O, to McDonald avenue, to Quentin road, to East Second street, to Avenue P, to East Third street to Avenue O, to East Fifth street, to Avenue P, to Ocean parkway, to Avenue R, to Kings highway, to McDonald avenue, to Avenue T, to West Ninth street, to Avenue V, to Stillwell avenue, to Bay Fiftieth street, to Cropsey avenue, to its intersection with the waters of Coney Island creek, and through the waters of Coney Island creek and Gravesend Bay to Nineteenth avenue extended, the point of beginning.

48. **FORTY-EIGHTH DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where Coney Island avenue intersects Ditmas avenue, thence along Coney Island avenue to Glenwood road, to Argyle road, to Foster avenue, to East Eighteenth street, to Glenwood road, to East Nineteenth street, to Foster avenue, to East Twenty-second street, to Glenwood road, to Ocean avenue, to Avenue I, to East Seventeenth street, to Avenue H, to East Fifteenth street, to Avenue J, to Coney Island avenue, to Avenue M, to East Tenth street, to Avenue P, to East Ninth street, to

Quentin road, to East Eighth street, to Avenue P, to East Seventh street, to Quentin road, to Ocean parkway, to Avenue P, to East Fifth street, to Avenue O, to East Third street, to Avenue P, to East Second street, to Quentin road, to McDonald avenue, to Avenue O, to Dahill road, to Avenue P, to West Fifth street, to Sixty-fifth street, to Bay parkway, to Sixty-second street, to Twenty-first avenue, to Fifty-ninth street, to Nineteenth avenue, to Fifty-fifth street, to Seventeenth avenue, to Fifty-ninth street, to New Utrecht avenue, to Fifty-eighth street, to Fort Hamilton parkway, to Fifty-second street, to Twelfth avenue, to Forty-eight street to New Utrecht avenue to Forty-seventh street, to Twelfth avenue, to Forty-third street, to Thirteenth avenue, to Thirty-seventh street, to Fourteenth avenue, to Thirty-ninth street, to Fifteenth avenue, to Thirty-eighth street, to Dahill road, to Ditmas avenue, to McDonald avenue, to Cortelyou road, to East Third street, to Ditmas avenue, thence along said avenue to its intersection with Coney Island avenue, the point of beginning.

49. **FORTY-NINTH DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where Nineteenth avenue extended intersects the waters of Gravesend bay, thence northerly along said avenue extended and said avenue, to Benson avenue, to Eighteenth avenue, to Eighty-sixth street, to New Utrecht avenue, to Eighteenth avenue, to Seventy-sixth street, to Nineteenth avenue, to Seventy-third street, to Twentieth avenue, to Seventy-second street, to Nineteenth avenue, to Bay Ridge avenue, to Seventeenth avenue, to Sixty-seventh street, to Sixteenth avenue, to Sixty-third street, to Twenty-first avenue, to Fifty-ninth street, to Nineteenth avenue, to Fifty-fifth street, to Seventeenth avenue, to Fifty-ninth street, to New Utrecht avenue, to Sixty-fifth street, to Fourteenth avenue, to Sixty-sixth street, to Thirteenth avenue, to Sixty-second street, to

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50. FIFTIETH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Second avenue intersects Thirty-ninth street, thence southerly along said avenue to Forty-first street, to First avenue, to Forty-second street, to Second avenue, to Forty-sixth street to Gowanus Expressway, to Forty-third street, to Fourth avenue, to Forty-eighth street, to Sixth avenue, to Fiftieth street, to Eighth avenue, to Fifty-sixth street, to Ninth avenue, to Fifty-fourth street, to Fort Hamilton parkway, to Fifty-eighth street, to New Utrecht avenue, to Sixty-fifth street, to Fourteenth avenue, to Sixty-sixth street, to Thirteenth avenue, to Sixty-second street, to Eighth avenue, to Sixty-first street, to Seventh avenue, to Sixty-fourth street, to Eighth avenue, to Seventieth street, to Seventh avenue, to Seventy-first street to Eighth avenue, to Seventy-second street, to Twelfth avenue, to Eightieth street, to Eleventh avenue, to Eighty-first street, to Seventh avenue, to Eighty-third street, to Dahlgreen place, to Eighty-fourth street, to Seventh avenue, to Eighty-fifth street, to Dahlgreen place, to Eighty-sixth street, to Gatling place, to Eighty-eighth street, to Fourth avenue, to Eighty-eighth street, to Ridge

boulevard, to Bay Ridge parkway, thence along said parkway and said parkway extended into the waters of the Narrows, and through the waters of the Narrows, Upper Bay, and Gowanus bay to their intersection with Thirty-ninth street extended thence along said street extended and said street to its intersection with Second avenue, the point of beginning.

51. FIFTY-FIRST DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Second avenue intersects Thirty-ninth street, thence along said avenue to Thirty-sixth street, to Gowanus expressway, to Eighteenth street, to Fourth avenue, to Tenth street, to Third avenue, to Eighth street, to Fourth avenue, to Seventh street, to Fifth avenue, to Fifth street, to Sixth avenue, to Sixth street, to Seventh avenue, to Fifth street, to Eighth avenue, to Sixth street, to Prospect park west, to Prospect park southwest, to Greenwood avenue, to Prospect expressway, to East Fifth street, to Caton avenue, to East Second street, to Greenwood avenue, to McDonald avenue, to Caton avenue, to Dahill road, to Fifteenth avenue, to Thirty-seventh street, to Dahill road, to Thirty-eighth street, to Fifteenth avenue, to Thirty-ninth street, to Fourteenth avenue, to Thirty-seventh street, to Thirteenth avenue, to Forty-third street, to Twelfth avenue, to Forty-seventh street, to New Utrecht avenue, to Forty-eighth street, to Twelfth avenue, to Fifty-second street, to Fort Hamilton parkway, to Fifty-fourth street, to Ninth avenue, to Fifty-sixth street, to Eighth avenue, to Fiftieth street, to Sixth avenue, to Forty-eighth street, to Fourth avenue, to Forty-third street, to Gowanus expressway, to Forty-sixth street, to Second avenue, to Forty-second street, to First avenue, to Forty-first street, to Second avenue, to its intersection with Thirty-ninth street, the point of beginning.

52. **FIFTY-SECOND DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where the Kings-New York county line intersects Cadman plaza west extended, thence southerly along said line into the waters of Upper Bay, and through the waters of Upper Bay and Gowanus Bay to their intersection with Thirty-ninth street extended, thence along said street extended and said street, to Second avenue, to Thirty-sixth street, to Gowanus expressway, to Eighteenth street, to Fourth avenue, to Tenth street, to Third avenue, to Eighth street, to Fourth avenue, to Seventh street, to Fifth avenue, to Fifth street, to Sixth avenue, to Fourth street, to Seventh avenue, to Third street, to Sixth avenue, to Union street, to Seventh avenue, to Berkeley place, to Grand Army plaza west, to Lincoln place, to Eighth avenue, to Flatbush avenue, to Sterling place, to Vanderbilt avenue, to Atlantic avenue, to Fifth avenue, to Warren street, to Fourth avenue, to Douglass street, to Third avenue, to Butler street, to Nerins street, to Baltic street, to Bond street, to Douglass street, to Hoy street, to Dean street, to Smith street, to Bergen street, to Court street, to State street, to Boerum place, to Schermerhorn street, to Court street, to Cadman plaza west, to Orange street, to Henry street, to Cranberry street, to Cadman plaza west, to Henry street, to Poplar street, to Hicks street, to the Brooklyn-Queens expressway, to Cadman plaza west, thence northwesterly along Cadman plaza west, and Cadman plaza west extended to its intersection with the Kings-New York county line, the point of beginning.

53. **FIFTY-THIRD DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where Atlantic avenue intersects Grand avenue, thence along Atlantic avenue to Franklin avenue, to Brecoort place, to Bedford avenue, to Fulton street, to Brooklyn avenue, to Atlantic avenue, to Albany avenue, to Fulton street, to Utica avenue, to Atlantic avenue, to

Rochester avenue, to Pacific street, to Utica avenue, to Bergen street, to Rochester avenue, to Prospect place, to Buffalo avenue, to Lincoln place, to Ralph avenue, to East New York avenue, to Lefferts avenue, to Schenectady avenue, to Eastern parkway, to Grand Army plaza east, to Vanderbilt avenue, to Atlantic avenue, to Carlton avenue, to Fulton Street, to Gates avenue, to Cambridge place, to Fulton street, to Grand avenue, to its intersection with Atlantic avenue, the point of beginning.

55. **FIFTY-FIFTH DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where Greene avenue intersects the Kings-Queens county line, thence southwesterly along said avenue to Knickerbocker avenue, to Bleecker street, to Wilson avenue, to Greene avenue, to Evergreen avenue, to Menahan street, to Bushwick avenue, to Grove street, to Goodwin place, to Greene avenue, to Broadway, to Ralph avenue, to Gates avenue, to Reid avenue, to Putnam avenue, to Stuyvesant avenue, to Jefferson avenue, to Reid avenue, to Marion street, to Fulton street, to Utica avenue, to Atlantic avenue, to Rochester avenue, to Pacific street, to Utica avenue, to Bergen street, to Rochester avenue, to Prospect place, to Buffalo avenue, to Lincoln place, to Ralph avenue, to East New York avenue, to Saratoga avenue, to Park place, to Hopkinson avenue, to Prospect place, to Saratoga avenue, to St. Marks avenue, to Howard avenue, to Bergin street, to Saratoga avenue, to Hancock street, to Broadway, to Hancock street, to Bushwick avenue, to Eldert street, to Evergreen avenue, to Covert street, to the Kings-Queens county line, thence northwesterly along said line to its intersection with Green avenue, the point of beginning.

56. **FIFTY-SIXTH DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where Broadway intersects Marcy avenue, thence southeasterly along Broadway, to Boerum street,

to Lorimer street, to Broadway, to Cook street, to Graham avenue, to Debevoise street, to Broadway, to Thornton street, to Flushing avenue, to Marcy avenue, to Myrtle avenue, to Throop avenue, to Lexington avenue, to Stuyvesant avenue, to Quincy street, to Reid avenue, to Putnam avenue, to Stuyvesant avenue, to Jefferson avenue, to Reid avenue, to Marion street, to Fulton street, to Albany avenue, to Atlantic avenue, to Brooklyn avenue, to Fulton street, to Bedford avenue, to Brevoort place, to Franklin avenue, to Atlantic avenue, to Grand avenue, to Putnam avenue, to Classon avenue, to Lafayette avenue, to Franklin avenue, to DeKalb avenue, to Skillman street, to Willoughby avenue, Franklin avenue, to Myrtle avenue to Bedford avenue, to Park avenue, to Skillman street, to Flushing avenue, to Bedford avenue, to Wallabout street, to Wythe avenue, to Heyward street, to Bedford avenue, to Brooklyn-Queens expressway, to Marcy avenue, to its intersection with Broadway, the point of beginning.

57. FIFTY-SEVENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where North Third street extended intersects the Kings-New York county line, thence along said street extended and said street to Wythe avenue, to Metropolitan avenue, to Berry street, to South Eighth street, to Driggs avenue, to Grand street extension, to Marcy avenue, to Brooklyn-Queens expressway, to Bedford avenue, to Heyward street, to Wythe avenue, to Wallabout street, to Bedford avenue, to Flushing avenue, to Skillman street, to Park avenue, to Bedford avenue, to Myrtle avenue, to Franklin avenue, to Willoughby avenue, to Skillman street, to DeKalb avenue, to Franklin avenue, to Lafayette avenue, to Classon avenue, to Putnam avenue, to Fulton street, to Cambridge place, to Gates avenue, to Fulton street, to Carlton avenue, to Atlantic avenue, to Fifth avenue, to Warren street, to Fourth avenue, to Douglass street, to Third avenue, to Butler street, to

Nevins street, to Baltic street, to Bond street, to Douglass street, to Hoyt street, to Dean street, to Smith street, to Bergen street, to Court street, to State street, to Boerum place, to Schermerhorn street, to Court street, to Cadman plaza west, to Orange street, to Henry street, to Cranberry street, to Cadman plaza west, to Henry street, to Poplar street, to Hicks street, to Brooklyn-Queens expressway, to Cadman plaza west, thence northwesterly along said plaza and said plaza extended, to its intersection with the Kings-New York county line, thence easterly and northerly along said line to its intersection with North Third street extended, the point of beginning.

59. FIFTY-NINTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Greene avenue intersects the Kings-Queens county line, thence southwesterly along said avenue to Knickerbocker avenue, to Bleecker street, to Wilson avenue, to Greene avenue, to Evergreen avenue, to Menahan street, to Bushwick avenue, to Grove street, to Goodwin place, to Greene avenue, to Broadway, to Ralph avenue, to Gates avenue, to Reid avenue, to Quincy street, to Stuyvesant avenue, to Lexington avenue, to Throop avenue, to Myrtle avenue, to Marcy avenue, to Flushing avenue, to Throop avenue, to Thornton street, to Broadway, to Debevoise street, to Graham avenue, to Cook street, to Broadway, to Lorimer street, to Boerum street, to Manhattan avenue, to McKibbin street, to Bushwick avenue, to McKibbin street, to White street, to Johnson avenue, to Bushwick place, to Meserole street, to Morgan avenue, to Johnson avenue, to the Kings-Queens county line, thence southeasterly along said line to its intersection with Greene avenue, the point of beginning.

70. SEVENTIETH DISTRICT. That part of the county of New York bounded by a line described as follows: Beginning at a point where West Ninety-seventh street intersects Central Park west, thence easterly through

Central Park on said street, to Fifth avenue, to East One Hundred-tenth street, to Madison avenue, to East One Hundred-eleventh street, to Fifth avenue, to East One Hundred-fifteenth street, to Madison avenue, to East One Hundred-twentieth street, to West One Hundred-twentieth street, to Mount Morris park west, to West One Hundred Twenty-fourth street, to Fifth avenue, to West One Hundred Twenty-sixth street, to Seventh avenue, to West One Hundred Twenty-seventh street, to Eighth avenue, to West One Hundred Twenty-ninth street, to St. Nicholas avenue, to West One Hundred Twenty-seventh street, to St. Nicholas terrace, to West One Hundred Thirtieth street, to Amsterdam avenue, to West One Hundred Twenty-ninth street, to Old Broadway, to West One Hundred Twenty-sixth street, to Amsterdam avenue, to West One Hundred Twenty-fifth street, to St. Clair place, thence along said place and said place extended to the New York-New Jersey line, thence southerly along said line to its intersection with West One Hundred Sixth street extended, thence along said street extended and said street, to West End avenue, to Broadway, to West One Hundred Eighth street, to Amsterdam avenue, to West One Hundred Seventh street, to Columbus avenue, to West One Hundred Fourth street, to Manhattan avenue, to West One Hundred-sixth street, to Central Park west, thence along Central Park west to its intersection with West Ninety-seventh street, the point of beginning.

71. SEVENTY-FIRST DISTRICT. That part of the county of New York bounded by a line described as follows: Beginning at a point where the One Hundred Forty-fifth street bridge intersects the New York-Bronx county line, thence westerly along said bridge to West One Hundred Forty-fifth street, to Lenox avenue, to West One Hundred Forty-sixth street, to Seventh avenue, to West One Hundred Forty-fifth street, to St. Nicholas avenue, to West One Hundred Forty-seventh street, to Con-

vent avenue, to West One Hundred Forty-sixth street, thence westerly along said street and said street extended, to the New York-New Jersey line, thence southerly along said line to its intersection with St. Clair place extended, thence easterly along said place extended and said place, to West One Hundred Twenty-fifth street, to Amsterdam avenue, to West One Hundred Twenty-sixth street, to Old Broadway, to West One Hundred Twenty-ninth street, to Amsterdam avenue, to West One Hundred Thirtieth street, to St. Nicholas terrace, to West One Hundred Twenty-seventh street, to St. Nicholas avenue, to West One Hundred Twenty-ninth street, to Eighth avenue, to West One Hundred Twenty-seventh street, to Seventh avenue, to West One Hundred Twenty-sixth street, to Fifth avenue, to East One Hundred Thirty-second street, to the New York-Central railroad bridge, thence northerly along said bridge to its intersection with the New York-Bronx county line, thence northerly along said line to its intersection with the One Hundred Forty-fifth street bridge, the point of beginning.

72. SEVENTY-SECOND DISTRICT. That part of the county of New York bounded by a line described as follows: Beginning at a point where the New York-Central railroad bridge intersects the New York-Bronx county line, thence southerly along said bridge to East One Hundred Thirty-second street, to Fifth avenue, to West One Hundred Twenty-fourth street, to Mount Morris park west, to West One Hundred Twentieth street, to East One Hundred Twentieth street, to Madison avenue, to East One Hundred Fifteenth street, to Fifth avenue, to East One Hundred Eleventh street, to Madison avenue, to East One Hundred Tenth street, to Fifth avenue, to East Ninety-sixth street, to Park avenue, to East Ninety-eighth street, to Madison avenue, to East Ninety-ninth street to Park avenue, to East One Hundredth street, to Third avenue, to East Ninety-seventh street, to Second avenue,

to East One Hundred Fifth street, to Third avenue, to East One Hundred Tenth street, to Second avenue, to East One Hundred Ninth street, to First avenue, to East One Hundred second street, thence along said street and said street extended, into the waters of the Harlem river, and through the waters of the Harlem river, and Hell Gate, to their intersection with the New York-Queens county line, thence along said line to the New York-Bronx county line, to its intersection with the New York-Central railroad bridge, the point of beginning; including all of Randall's Island, and Ward's Island.

74. SEVENTY-FOURTH DISTRICT. That part of the county of New York bounded by a line described as follows: Beginning at a point where West One Hundred Seventy-third street extended intersects the New York-Bronx county line, thence westerly along said street extended and said street to Audubon avenue, to West One Hundred Seventy-fifth street, to St. Nicholas avenue, to West One Hundred Eighty-third street, to Wadsworth avenue, to West One Hundred Eighty-second street, to Broadway, to West One Hundred Seventy-eighth street, to Washington avenue, to West One Hundred Seventy-sixth street, to Haven avenue, to West One Hundred Seventy-seventh street, to Cabrini boulevard, to West One Hundred Seventy-eighth street, to the George Washington bridge, thence westerly along said bridge to its intersection with the New York-New Jersey line, thence southerly along said line to its intersection with West One Hundred Forty-sixth street extended, thence easterly along said street extended and said street to Convent avenue, to West One Hundred Forty-seventh street, to St. Nicholas avenue, to West One Hundred Forty-fifth street, to Seventh avenue, to West One Hundred Forty-sixth street, to Lenox avenue, to West One Hundred Forty-fifth street, to the West One Hundred Forty-fifth street bridge, thence easterly along said bridge to its intersection with the

New York-Bronx county line, thence northerly along said line to its intersection with West One Hundred Seventy-third street extended, the point of beginning.

§ 3. The descriptions of the sixteenth, seventeenth, eighteenth, nineteenth, twenty-third, twenty-fifth, twenty-eighth and twenty-ninth senate districts contained in section one hundred twenty-four of such law are hereby repealed, and new descriptions of such districts are hereby inserted therein, in lieu thereof, to read, respectively, as follows:

16. SIXTEENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Atlantic avenue intersects the Kings-Queens county line, thence westerly along said avenue to Crescent street, to Fulton street, to Euclid avenue, to Ridgewood avenue, to Chestnut street, to Dinsmore place, to Richmond street, to Fulton street, to Logan street, to Atlantic avenue, to Highland street, to Arlington avenue, to Linwood street, to Ridgewood avenue, to Elton street, to Arlington avenue, to Ashford street, to Fulton street, to Van Siclen avenue, to Liberty avenue, to Hendrix street, to Belmont avenue, to Barbey street, to New Lots avenue, to Riverdale avenue, to Georgia avenue, to New Lots avenue, to Hegeman avenue, to East Ninety-eighth street, to East New York avenue, to Ralph avenue, to Eastern parkway, to Rochester avenue, to Carroll street, to Ford street, to Crown street, to Utica avenue, to Lefferts avenue, to Schenectady avenue, to Rutland road, to East Forty-fifth street, to Winthrop street, to Albany avenue, to Clarkson avenue, to East Forty-second street, to Church avenue, to East Thirty-seventh street, to Snyder avenue, to Brooklyn avenue, to Cortelyou Road, to East Thirty-fifth street, to Avenue D. to Brooklyn avenue, to Foster avenue, to Albany avenue, to Avenue I, to East Thirty-eighth street, to Avenue K, to Flatbush avenue, to Lott place, to Harden street, to Flatlands avenue, to Schenec-

tady avenue, to Avenue K, to East Forty-eighth street, to Flatlands avenue, to Avenue K, to East Fifty-first street, to Flatlands avenue, thence along said avenue to its intersection with Paerdegat avenue south, thence along said avenue extended into the waters of the Paerdegat basin, thence through the waters of Paerdegat basin, Big channel, and Rockaway inlet to their intersection with the Kings-Queens county line, thence easterly and northerly along said line to its intersection with Atlantic avenue, the point of beginning.

17. SEVENTEENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Willoughby avenue intersects the Kings-Queens county line, thence westerly along said avenue to Irving avenue, to Starr street, to Central avenue, to Troutman street, to Evergreen avenue, to Troutman street, to Bushwick avenue, to Myrtle avenue, to Ditmars street, to Broadway, to De Kalb avenue, to Reid avenue, to Kosciusko street, to Broadway, to Ralph avenue, to East New York avenue, to East Ninety-eighth street, to Hegeman avenue, to New Lots avenue, to Georgia avenue, to Riverdale avenue, to New Lots avenue, to Barbey street, to Belmont avenue, to Hendrix street, to Liberty avenue, to Van Siclen avenue, to Fulton street, to Ashford street, to Ridgewood avenue, to Cleveland street, to Jamaica avenue, to western boundary of Highland park, thence along said boundary to the Kings-Queens county line, thence westerly and northerly along said line to its intersection with Willoughby avenue, the point of beginning.

18. EIGHTEENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Willoughby avenue intersects the Kings-Queens county line, thence westerly along said avenue to Irving avenue, to Starr street, to Central avenue, to Troutman street, to Evergreen avenue, to Troutman

street, to Bushwick avenue, to Myrtle avenue, to Ditmars street, to Broadway, to De Kalb avtnue, to Reid avenue, to Kosciusko street, to Broadway, to Ralph avenue, to Eastern parkway, to Rochester avenue, to Carroll street, to Ford street, to Crown street, to Utica avenue, to Lefferts avenue, to Troy avenue, to Carroll street, to Brooklyn avenue, to Lincoln place, to New York avenue, to St. John's place, to Brooklyn avenue, to Sterling place, to New York avenue, to Fulton street, to Marcy avenue, to Gerry street, to Harrison avenue, to Wallabout street, to Throop avenue, to Gerry street, to Broadway, to Leonard street, to Frost street, to Lorimer street, to Richardson street, to North Eleventh street, to Driggs avenue, to North Tenth street, to Bedford avenue, to North Eleventh street, thence westerly along said street and said street extended to the Kings-New York county line, thence northerly along said line to its intersection with the Kings-Queens county line, thence easterly and southerly along said line to its intersection with Willoughby avenue, the point of beginning.

19. NINETEENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Schenectady avenue intersects Lefferts avenue, thence southerly along Schenectady avenue to Rutland road, to East Forty-fifth street, to Winthrop street, to Albany avenue, to Clarkson avenue, to East Forty-second street, to Church avenue, to East Thirty-seventh street, to Snyder avenue, to Brooklyn avenue, to Cortelyou road, to East Thirty-fifth street, to Avenue D, to Brooklyn avenue, to Foster avenue, to Albany avenue, to Avenue I, to East Thirty-eighth street, to Avenue K, to Flatbush avenue, to Flatlands avenue, to Coleman street, to Avenue P, to Kimball street, to Flatlands avenue, to Avenue N, to Kings highway, to Avenue O, to East Twenty-third street, to Kings highway, to East Twenty-second street, to Avenue O, to East Twenty-first

street, to Avenue N, to Coney Island avenue, to Avenue O, to Dahill road, to Sixtieth street, to McDonald avenue, to Avenue J, to Dahill road, to Avenue I, to McDonald avenue, to Foster avenue, to Ocean parkway, to Eighteenth avenue, to East Seventh street, to Ditmas avenue, to East Eighth street, to Avenue C, to East Fourth street, to Church avenue, to East Third street, to Albemarle road, to McDonald avenue, to Greenwood avenue, to East Fifth street, to Prospect expressway, to Greenwood avenue, to Prospect Park southwest, to Prospect Park west, to Grand Army plaza west, to Grand Army plaza east, to Vanderbilt avenue, to Park place, to Washington avenue, to St. Johns place, to Franklin avenue, to Washington avenue, to Lefferts avenue, to Brooklyn avenue, to Carroll street, to Troy avenue, to Lefferts avenue, thence easterly along said avenue, to its intersection with Schenectady avenue, the point of beginning.

23. **TWENTY-THIRD DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where Bedford avenue intersects North Tenth street, thence southerly along said avenue to North Eighth street, to Driggs avenue, to North Fourth street, to Bedford avenue, to Metropolitan avenue, to Driggs avenue, to South Fourth street, to Marcy avenue, to the Brooklyn-Queens expressway, to Grand avenue, to Myrtle avenue, to Adelphi street, to the Brooklyn-Queens expressway, to Prince street, to Flatbush avenue, to Willoughby street, to Debevoise place, to De Kalb avenue, to Fulton street, to Hoyt street, to Fourth street, to Bond street and Bond street extended into the waters of the Gowanus canal, and through the waters of the Gowanus canal to their intersection with Second avenue extended, thence along said avenue extended and said avenue, to Sixth street, to Seventh avenue, to Union street, to Grand Army plaza west, to Grand Army plaza east, to Vanderbilt avenue, to Park place, to Washington avenue, to St.

John's place, to Franklin avenue, to Washington avenue, to Lefferts avenue, to Brooklyn avenue, to Lincoln place, to New York avenue, to St. John's place, to Brooklyn avenue, to Sterling place, to New York avenue, to Fulton street, to Marcy avenue, to Gerry street, to Harrison avenue, to Wallabout street, to Throop avenue, to Gerry street, to Broadway, to Leonard street, to Frost street, to Lorimer street, to Richardson street, to North Eleventh street, to Driggs avenue, to North Tenth street, thence westerly along said street to its intersection with Bedford avenue, the point of beginning.

25. **TWENTY-FIFTH DISTRICT.** That part of the county of Kings bounded by a line described as follows: Beginning at a point where North Eleventh street extended intersects the Kings-New York county line, thence easterly along said street extended and said street to Bedford avenue, to North Eighth street, to Driggs avenue, to North Fourth street, to Bedford avenue, to Metropolitan avenue, to Driggs avenue, to South Fourth street, to Marcy avenue, to the Brooklyn-Queens expressway, to Grand avenue, to Myrtle avenue, to Adelphi street, to the Brooklyn-Queens expressway, to Prince street, to Flatbush avenue, to Willoughby street, to Debevoise place, to De Kalb avenue, to Fulton street, to Hoyt street, to Fourth street, to Bond street and Bond street extended into the waters of the Gowanus canal, and through the waters of the Gowanus canal to their intersection with Second avenue extended, thence along said avenue extended and said avenue, to Sixth street, to Seventh avenue, to Prospect expressway, to Gowanus expressway, to its intersection with the waters of Gowanus creek, thence through the waters of Gowanus creek, Gowanus bay, and Upper Bay to their intersection with the Kings-New York county line, thence northerly along said line to its intersection with North Eleventh street extended, the point of beginning.

28. **TWENTY-EIGHTH DISTRICT.** *That part of the county of New York bounded by a line described as follows: Beginning at a point where West One Hundred Twelfth street extended intersects the New York-New Jersey line, thence along said street extended and said street to Broadway, to West One Hundred Thirty-third street, to Amsterdam avenue, to West One Hundred Fortieth street, to Convent avenue, to West One Hundred Forty-first street, to Eighth avenue, to West One Hundred Thirty-ninth street, to Seventh avenue, to West One Hundred Fifty-second street, thence along said street and said street extended to Harlem River Drive, to the Macombs Dam bridge, to its intersection with the New York-Bronx county line, thence southerly along said line to its intersection with the One Hundred Forty-fifth street bridge, thence along said bridge to Harlem River drive, to Fifth avenue, to East One Hundred Thirtieth street, to Madison avenue, to East One Hundred Twenty-ninth street, to Fifth avenue, to East One Hundred Twenty-sixth street, to Madison avenue, to East One Hundredth Nineteenth street, to Park avenue, to East One Hundred Seventeenth street, to Madison avenue, to East One Hundred Sixteenth street, to Park avenue, to East One Hundred Tenth street, to Fifth avenue, to West Ninety-sixth street, thence westerly through Central Park on West Ninety-sixth street to West Ninety-seventh street, to Central Park west, to West Ninety-second street, to Broadway, to West Eighty-sixth street, to Amsterdam avenue, to West Seventy-eighth street, to Broadway, to West Seventy-sixth street, to Amsterdam avenue, to West Seventieth street, to West End avenue, to West Seventy-first street, thence along said street and said street extended to its intersection with the New York-New Jersey line, thence northerly along said line to its intersection with West One Hundred Twelfth street extended, the point of beginning.*

29. **TWENTY-NINTH DISTRICT.** *That part of the county of New York bounded by a line described as fol-*

lows: Beginning at a point where West One Hundred Twelfth street extended intersects the New York-New Jersey line, thence along said street extended and said street to Broadway, to West One Hundred Thirty-third street, to Amsterdam avenue, to West One Hundred Fortieth street, to Convent avenue, to West One Hundred Forty-first street, to Eighth avenue, to West One Hundred Thirty-ninth street, to Seventh avenue, to West One Hundred Fifty-second street, thence along said street and said street extended to Harlem River Drive, to the Macombs Dam bridge, to its intersection with the New York-Bronx county line, thence northerly, westerly, southerly, and westerly to the New York-New Jersey line, thence southerly along said line to its intersection with West One Hundred Twelfth street extended, the point of beginning.

§ 4. In order to provide for an orderly election of members of the legislature and in recognition of the constitutional mandate that legislative districts shall be created by law subject to judicial review under such reasonable regulations as the legislature may prescribe, it is hereby determined and declared that no order of the court invalidating this act or part thereof shall be entered in a manner which will deprive the legislature of an opportunity to discharge its constitutional mandate. In any proceeding for judicial review of the provisions of this act, the determination of the court shall be embodied in a tentative order which shall become final thirty days after service of copies thereof upon the parties unless the court shall, in the interval, on application of any party, resettle its order.

§ 5. If any part or provision of this act relating to any senate or assembly district shall be adjudged invalid by a court of competent jurisdiction, such judgment shall: (1) be confined in its operation to the part or provision of this act or the district or districts described herein

directly involved in the controversy in which such judgment shall have been rendered, and (2) not affect or impair the validity of the remaining parts, provisions or districts described in this act or elsewhere.

§ 6. a. This act shall be liberally construed to effectuate the purposes thereof and to apportion and district this state in compliance with constitutional requirements.

b. It is intended that the apportionment and districting provided for in this act result in the creation of districts containing equal population. It is also intended that no senate district shall include any of the area included within the description of any other senate district. It is further intended that no assembly district shall include any of the area included within the description of any other assembly district.

§ 7. a. If the districts described in this act do not carry out the purposes thereof, because of unintentional omissions; duplications; overlapping areas; erroneous nomenclature; lack of adequate maps or descriptions of political subdivisions, wards, or other divisions thereof, or of their boundary lines; street closings, changes in names of streets, or other changes of public places; alteration of the boundary or courses of waters or waterways, filling in of lands under water, accretion or other changes in shorelines; or alteration of courses, rights of way, or lines of public utilities or other conditions, then the secretary of state, at the request of any person aggrieved thereby or candidate affected thereby, shall, by order, correct such omissions, overlaps, erroneous nomenclature, or other defects in the description of districts so as to accomplish the purposes and objectives of this act.

b. In promulgating such orders, the secretary of state, in addition to achieving equality in the population of districts and insuring that all areas of the state are com-

pletely and accurately encompassed in such districts, shall be guided by the following standards:

(1) Gaps in the description of any district shall be completed in a manner which results in a total description of that district in a manner which is consonant with the description of adjacent districts and results in complete contiguity of districts.

(2) Areas of the state included within the descriptions of more than one district shall be allocated to the district having the lowest population.

(3) Areas of the state not included within the descriptions of any district shall be allocated to the adjacent district having the lowest population.

(4) In the event that the area subject to corrected description of allocation as provided in paragraphs one, two or three of this subdivision is of such size or contains such population that its inclusion as a unit in any district would result in substantial disparity in the size, shape or population of such district, then the secretary of state may allocate portions of such area to two or more districts.

(5) In any allocation of area or correction of descriptions made pursuant to this section, the secretary of state shall, consistent with the foregoing standards, preserve the contiguity and compactness of districts and avoid the unnecessary division of political subdivisions.

c. Copies of such orders shall be filed by the secretary of state in his own office and in the office of the affected boards of election. In addition, a copy of such order shall be served upon the person or candidate, if any, who instituted the application for such an order. The secretary of state may adopt reasonable rules regulating the procedure for applications for orders under this section in the manner of serving and filing any notice or copy of orders relating thereto.

d. Upon the filing of such an order, the description of any affected district shall be deemed to have been corrected in the manner provided in such order to the full extent as if such correction had been contained in the original description set forth in this act.

§ 8. The senate and assembly districts of this state, as existing immediately prior to the effective date of this act, shall continue to be the senate and assembly districts of the state for the purpose of filling vacancies in the office of senator or assemblyman at any special election held prior to the general election of the year nineteen hundred seventy-four.

§ 9. The senate and assembly districts of this state, from and after the effective date of this act, shall be the senate and assembly districts of the state for the purpose of designating and nominating candidates for such offices.

§ 10. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 11. This act shall take effect immediately.

STATE OF NEW YORK

S. 2

A. 2

Extraordinary Session

SENATE—ASSEMBLY

May 29, 1974

IN SENATE—Introduced by COMMITTEE ON RULES
—(at request of the Joint Committee on Reapportionment)—read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of the Joint Committee on Reapportionment)—read once and referred to the Committee on Rules

AN ACT

To amend the state law, in relation to certain congressional districts and to repeal the descriptions relating to such districts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The descriptions of the twelfth, thirteenth, fourteenth and fifteenth congressional districts contained in section one hundred eleven of the state law are hereby repealed and new descriptions of such districts are hereby inserted therein, in lieu thereof, to read, respectively, as follows:

12. TWELFTH CONGRESSIONAL DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Manhattan avenue

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.

intersects the Kings-Queens county line, thence southerly along said avenue to Calyer street, to Leonard street, to Richardson street, to the Brooklyn-Queens expressway, to Metropolitan avenue, to Lorimer street, to Ten Eyck street, to Leonard street, to Boerum street, to Lorimer street, to Broadway, to Flushing avenue, to Throop avenue, to Hancock street, to Sumner avenue, to Halsey street, to Throop avenue, to Fulton street, to Albany avenue, to Herkimer street, to Troy avenue, to Eastern parkway, to Schenectady avenue, to Crown street, to Rochester avenue, to East New York avenue, to East Ninety-eighth street, to Blake avenue, to Hopkinson avenue, to Livonia avenue, to Junius street, to Dumont avenue, to Pennsylvania avenue, to Blake avenue, to Miller avenue, to Belmont avenue, to Wyona street, to Liberty avenue, to New Jersey avenue, to Jamaica avenue, to Miller avenue, to Highland boulevard, thence easterly along said boulevard to its intersection with the Kings-Queens county line, thence northerly and westerly along said line to its intersection with Manhattan avenue, the point of beginning.

13. THIRTEENTH CONGRESSIONAL DISTRICT.

That part of the county of Kings bounded by a line described as follows: Beginning at a point where Ocean avenue intersects Parkside avenue, thence southerly along Ocean avenue to Woodruff avenue, to East Twenty-first street, to Caton avenue, to Flatbush avenue, to Martense street, to Bedford avenue, to Snyder avenue, to Flatbush avenue, to Stephens court, to East Twenty-third street, to Foster avenue, to Coney Island avenue, to Avenue H, to East Eighth street, to Foster avenue, to Ocean parkway, to Avenue I, to East Seventh street, to Avenue J, to Ocean parkway, to Avenue M, to East Ninth street, to Avenue N, to East Seventh street, to Avenue O, to Ocean parkway, to Quentin road, to East Seventh street, to Avenue P, to East Eighth street, to Quentin road, to East Ninth street, to Avenue P, to East Tenth street, to Avenue O, to Coney

Island avenue, to Avenue P, to East Nineteenth street, to Avenue R, to East Twenty-third street, to Gravesend Neck road, to Bedford avenue, to Avenue Z, to Nostrand avenue, to Shore parkway, to Flatbush avenue, thence southerly along said avenue, and said avenue extended into the waters of Rockaway inlet, thence through the waters of Rockaway inlet, the Atlantic ocean, Lower Bay, Gravesend Bay, and Coney Island creek to their intersection with Cropsey avenue, thence northerly along said avenue to Bay Fiftieth street, to Stillwell avenue, to Eighty-fourth street, to Twenty-fourth avenue, to Eighty-fifth street, to Twentieth avenue, to Eighty-sixth street, to Nineteenth avenue, to Seventy-third street, to Twentieth avenue, to Seventy-second street, to Nineteenth avenue, to Bay Ridge avenue, to Seventeenth avenue, to Sixty-seventh street, to Sixteenth avenue, to Sixty-third street, to Seventeenth avenue, to Sixty-fourth street, to Eighteenth avenue, to Sixty-third street, to Nineteenth avenue, to Fifty-fifth street, to Seventeenth avenue, to Fifty-ninth street, to New Utrecht avenue, to Fifty-eighth street, to Fort Hamilton parkway, to Fifty-second street, to Twelfth avenue, to Forty-eighth street, to New Utrecht avenue, to Forty-seventh street, to Twelfth avenue, to Forty-third street, to Thirteenth avenue, to Thirty-eighth street, to Fourteenth avenue, to Old New Utrecht road, to Thirty-sixth street, to Church avenue, to Dahill road, to Caton avenue, to East Fifth street, to Prospect expressway, to Greenwood avenue, to Prospect Park southwest, to Park circle, to Parkside avenue, thence easterly along said avenue to its intersection with Ocean avenue, the point of beginning.

14. FOURTEENTH CONGRESSIONAL DISTRICT.

That part of the county of Kings bounded by a line described as follows: Beginning at a point where Manhattan avenue intersects the Kings-Queens county line, thence southerly along said avenue to Calyer street, to Leonard street, to Richardson street, to the Brooklyn-Queens ex-

pressway, to Metropolitan avenue, to Lorimer street, to Ten Eyck street, to Leonard street, to Boerum street, to Lorimer street, to Broadway, to Flushing avenue, to Throop avenue, to Hancock street, to Sumner avenue, to Halsey street, to Throop avenue, to Fulton street, to Albany avenue, to Herkimer street, to Troy avenue, to Eastern parkway, to New York avenue, to Malbone street, to Clover road, to Empire boulevard, to Washington avenue, to Eastern parkway, to Classon avenue, to Park place, to Vanderbilt avenue, to Sterling place, to Butler street, to Fourth avenue, to Prospect expressway, to Gowanus expressway, to Hamilton avenue, thence along said avenue and said avenue extended to its intersection with the Kings-New York county line, thence northerly along said line to its intersection with the Kings-Queens county line, thence easterly along said line to its intersection with Manhattan avenue, the point of beginning.

15. FIFTEENTH CONGRESSIONAL DISTRICT. *That part of the county of Kings bounded by a line described as follows: Beginning at a point where Parkside avenue intersects Ocean avenue, thence westerly along Parkside avenue, to Park circle, to Prospect Park southwest, to Greenwood avenue, to Prospect expressway, to East Fifth street, to Caton avenue, to Dahill road, to Church avenue, to Thirty-sixth street, to Old New Utrecht road, to Fourteenth avenue, to Thirty-eighth street, to Thirteenth avenue, to Forty-third street, to Twelfth avenue, to Forty-seventh street, to New Utrecht avenue, to Forty-eighth street, to Twelfth avenue, to Fifty-second street, to Fort Hamilton parkway, to Fifty-eighth street, to New Utrecht avenue, to Fifty-ninth street, to Seventeenth avenue, to Fifty-fifth street, to Nineteenth avenue, to Sixty-third street, to Eighteenth avenue, to Sixty-fourth street, to Seventeenth avenue, to Sixty-third street, to Sixteenth avenue, to Sixty-seventh street to Seventeenth avenue, to Bay Ridge avenue, to Nineteenth avenue, to Seventy-second*

street, to Twentieth avenue, to Seventy-third street, to Nineteenth avenue, to Sixty-sixth street, to Twentieth avenue, to Eighty-fifth street, to Twenty-fourth avenue, to Eighty-fourth street, to Stillwell avenue, to Bay Fiftieth street, to Cropsey avenue, thence southerly along said avenue to its intersection with the waters of Coney Island creek, thence through the waters of Coney Island Creek, to their intersection with the Kings-New York county Gravesend Bay, Lower Bay, the Narrows, and Upper Bay line, thence northerly and easterly along said line to its intersection with Hamilton avenue extended, thence easterly along said avenue extended and said avenue to Gowanus expressway, to Prospect expressway, to Fourth avenue, to Butler street, to Sterling place, to Vanderbilt avenue, to Park place, to Classon avenue, to Eastern parkway, to Washington avenue, to Empire avenue, to Ocean avenue, thence southerly along said avenue to its intersection with Parkside avenue, the point of beginning.

§ 2. a. This act shall be liberally construed to effectuate the purposes thereof and to apportion and district this state in compliance with constitutional requirements and to satisfy the objections of the United States Department of Justice set forth in a determination dated April first, nineteen hundred seventy-four. In any proceeding for judicial review of the provisions of this act, the determination of the court shall be embodied in a tentative order which shall become final thirty days after service of copies thereof upon the parties unless the court shall, in the interval, on application of any party, resettle its order.

b. It is intended that the apportionment and districting provided for in this act result in the creation of districts containing equal population. It is also intended that no district shall include any of the area included within the description of any other district.

§ 3. a. If the districts described in this act do not carry out the purposes thereof, because of unintentional omis-

sions; duplications; overlapping areas; erroneous nomenclature; lack of adequate maps or descriptions of political subdivisions, wards, or other divisions thereof, or of their boundary lines; street closings, changes in names of streets, or other changes of public places; alteration of the boundary or courses of waters or waterways, filling in of lands under water, accretion or other changes in shorelines or alteration of courses, rights of way, or lines of public utilities or other conditions, then the secretary of state, at the request of any person or candidate, aggrieved thereby, shall, by order, correct such omissions, overlaps, tion of districts so as to accomplish the purposes and erroneous nomenclature, or other defects in the descriptive objectives of this act.

b. In promulgating such orders, the secretary of state, in addition to achieving equality in the population of districts and insuring that all areas of the state are completely and accurately encompassed in such districts, shall be guided by the following standards:

(1) Gaps in the description of any district shall be completed in a manner which results in a total description of that district in a manner which is consonant with the description of adjacent districts and results in complete contiguity of districts.

(2) Areas of the state included within the descriptions of more than one district shall be allocated to the district having the lowest population.

(3) Areas of the state not included within the descriptions of any district shall be allocated to the adjacent district having the lowest population.

(4) In the event that the area subject to corrected description or allocation as provided in paragraphs one, two or three of this subdivision is of such size or contains such population that its inclusion as a unit in any district would

result in substantial disparity in the size, shape or population of such district, then the secretary of state may allocate portions of such area to two or more districts.

(5) In any allocation of area or correction of descriptions made pursuant to this section, the secretary of state shall, consistent with the foregoing standards, preserve the contiguity and compactness of districts and avoid the unnecessary division of political subdivisions.

c. Copies of such orders shall be filed by the secretary of state in his own office and in the office of the affected boards of election. In addition, a copy of such order shall be served upon the person or candidate, if any, who instituted the application for such an order. The secretary of state may adopt reasonable rules regulating the procedure for applications for orders under this section in the manner of serving and filing any notice or copy of orders relating thereto.

d. Upon the filing of such an order, the description of any affected district shall be deemed to have been corrected in the manner provided in such order to the full extent as if such correction had been contained in the original description set forth in this act.

§ 4. If any part or provision of this act relating to any congressional district shall be adjudged invalid by a court of competent jurisdiction, such judgment shall: (1) be confined in its operation to the part or provision of this act or the district or districts described herein directly involved in the controversy in which such judgment shall have been rendered, and (2) not affect or impair the validity of the remaining parts, provisions or districts described in this act or elsewhere.

§ 5. The congressional districts of this state, as existing immediately prior to the effective date of this act, shall continue to be the congressional districts of the state for

the purpose of filling vacancies in the office of representative in congress at any special election held prior to the general election of the year nineteen hundred seventy-four.

§ 6. The congressional districts of this state, from and after the effective date of this act, shall be the congressional districts of the state for the purpose of designating and nominating candidates for representatives in congress, and for electing district delegates and alternate district delegates to national party conventions.

§ 7. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 8. This act shall take effect immediately.

STATE OF NEW YORK

S. 3

A. 3

SENATE—ASSEMBLY

Extraordinary Session

May 29, 1974

IN SENATE—Introduced by COMMITTEE ON RULES
—(at request of the Joint Committee on Reapportionment)—read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of the Joint Committee on Reapportionment)—read once and referred to the Committee on Rules

AN ACT

To amend the Reapportionment Compliance Act of nineteen hundred seventy-four, in relation to the descriptions of certain senate districts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The descriptions of the sixteenth and seventeenth senate districts of section three of a chapter of the laws of nineteen hundred seventy-four, entitled "AN ACT" to amend the state law, in relation to certain assembly and senate districts and to repeal the descriptions relating to such districts", constituting the Reapportionment Compliance Act of nineteen hundred seventy-four, are hereby amended to read, respectively, as follows:

16. SIXTEENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Begin-

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.

ning at a point where Atlantic avenue intersects the Kings-Queens county line, thence westerly along said avenue to Crescent street, to Fulton street, to Euclid avenue, to Ridgewood avenue, to Chestnut street, to Dinsmore place, to Richmond street, to Fulton street, to Logan street, to Atlantic avenue, to Highland street, to Arlington avenue, to Linwood street, to Ridgewood avenue to Elton street, to Arlington avenue, to Ashford street, *to Ridgewood avenue to Cleveland street, to Jamaica avenue, to the western boundary of Highland Park, thence northerly along said boundary to its intersection with the Kings-Queens county line, thence westerly along said line to its intersection with Interborough parkway, thence along said parkway to Highland boulevard, to Bushwick avenue, to Jamaica avenue, to Pennsylvania avenue, to Fulton street, to Van Sielen avenue, to Liberty avenue, to Hendrix street, to Belmont avenue, to Barbey street, to New Lots avenue, to Riverdale avenue, to Georgia avenue, to New Lots avenue, to Hegeman avenue[, to East Ninety-eighth street, to East New York avenue, to Ralph avenue, to Eastern parkway, to Rochester avenue, to Carroll street, to Ford street, to Crown street, to Utica avenue[, to Church avenue, to Rockaway parkway, to Willmohr street, to East Ninety-eighth street, to Rutland road, to Remsen avenue, to East New York avenue, to Lefferts avenue, to Schenectady avenue, to Rutland road, to East Forty-fifth street, to Winthrop street, to Albany avenue, to Clarkson avenue, to East Forty-second street, to Church avenue, to East Thirty-seventh street, to Snyder avenue, to Brooklyn avenue, to Cortelyou road, to East Thirty-fifth street, to Avenue D, to Brooklyn avenue, to Foster avenue, to Albany avenue, to Avenue I, to East Thirty-eighth street, to Avenue K, to Flatbush avenue, to Lott place, to Harden street, to Flatlands avenue, to Schenectady avenue, to Avenue K, to East Forty-eighth street, to Flatlands avenue, to Avenue K, to East Fifty-first street, to Flatlands avenue, thence along said avenue to its inter-*

section with Paerdegat avenue south, thence along said avenue extended into the waters of the Paerdegat basin, thence through the waters of Paerdegat basin, Big channel, and Rockaway inlet to their intersection with the Kings-Queens county line, thence easterly and northerly along said line to its intersection with Atlantic avenue, the point of beginning.

17. SEVENTEENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Willoughby avenue intersects the Kings-Queens county line, thence westerly along said avenue to Irving avenue, to Starr street, to Central avenue, to Troutman street, to Evergreen avenue, to Troutman street, to Bushwick avenue, to Myrtle avenue, to Ditmars street, to Broadway, to De Kalb avenue, to Reid avenue, to Kosciusko street, to Broadway, to Ralph avenue[, to East New York avenue], *to Eastern parkway, to Rochester avenue, to Carroll street, to Ford street, to Crown street, to Utica avenue, to East New York avenue, to Remsen avenue, to Rutland road, to East Ninety-eighth street, to Willmohr street, to Rockaway parkway, to Church avenue, to East Ninety-eighth street, to Hegeman avenue, to New Lots avenue, to Georgia avenue, to Riverdale avenue, to New Lots avenue, to Barbey street, to Belmont avenue, to Hendrix street, to Liberty avenue, to Van Sielen avenue, to Fulton street, [to Ashford street, to Ridgewood avenue, to Cleveland street, to Jamaica avenue, to the western boundary of Highland park, thence along said boundary to the Kings-Queens county line, thence westerly and] to Pennsylvania avenue, to Jamaica avenue, to Bushwick avenue, to Highland boulevard, to Interborough parkway, to its intersection with the Kings-Queens county line, thence northerly along said line to its intersection with Willoughby avenue, the point of beginning.*

§ 2. This act shall take effect immediately.

S. 6

STATE OF NEW YORK

SENATE—ASSEMBLY

Extraordinary Session

May 29, 1974

A. 6

IN SENATE—Introduced by COMMITTEE ON RULES
—(at request of the Joint Committee on Reapportionment)—read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of the Joint Committee on Reapportionment)—read once and referred to the Committee on Rules

AN ACT

To amend the Reapportionment Compliance Act of nineteen hundred seventy-four, in relation to the descriptions of certain assembly and senate districts and to repeal the descriptions relating to such districts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The descriptions of the forty-fourth, forty-eighth, fifty-second, seventieth, and seventy-first assembly districts of section two of a chapter of the laws of nineteen hundred seventy-four, entitled "AN ACT to amend the state law, in relation to certain assembly and senate districts and to repeal the descriptions relating to such districts, constituting the Reapportionment Compliance Act of nineteen hundred seventy-four, are hereby REPEALED, and new descriptions of such districts are hereby inserted therein, in lieu thereof, to read, respectively, as follows:

44. FORTY-FOURTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Parkside avenue intersects Ocean avenue, thence along Ocean avenue to Woodruff avenue, to East Twenty-first street, to Caton avenue, to Flatbush avenue, to Martense street, to Bedford avenue, to Snyder avenue, to Flatbush avenue, to Stephens court, to East Twenty-third street, to Farragut road, to East Twenty-second street, to Glenwood road, to East Nineteenth street, to Foster avenue, to East Eighteenth street, to Glenwood road, to Coney Island avenue, to Webster avenue, to East Eighth street, to Eighteenth avenue, to Coney Island avenue, to Ditmas avenue, to East Fifth street, to Church avenue, to East Third street, to Cortel-you road, to McDonald avenue, to Ditmas avenue, to Dahill road, to Thirty-seventh street, to Fifteenth avenue, to Dahill road, to Caton avenue, to McDonald avenue, to Greenwood avenue, to East Second street, to Caton avenue, to East Fifth street, to Prospect expressway, to Greenwood avenue, to Prospect park southwest, to Prospect park west, to Sixth street, to Eighth avenue, to Third street, to Sixth avenue, to Union street, to Seventh avenue, to Berkeley place, to Sixth avenue, to Lincoln place, to Seventh avenue, to St. Johns place, to Eighth avenue, to Flatbush avenue, to Sterling place, to Vanderbilt avenue, to Grand Army Plaza east, to Eastern Parkway, to New York avenue, to Malbone street, to Clove road, to Empire boulevard, to Nostrand avenue, to Montgomery street, to Rogers avenue, to Empire boulevard, to Ocean avenue, thence along said avenue to its intersection with Parkside avenue, the point of beginning.

48. FORTY-EIGHTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Coney Island avenue intersects Ditmas avenue, thence along Coney Island avenue to Ditmas avenue, to East Eighth street, to Webster ave-

nue, to Coney Island avenue, to Glenwood road, to East Eighteenth street, to Foster avenue, to East Nineteenth street, to Glenwood road, to Ocean avenue, to Avenue I, to East Seventeenth street, to Avenue H, to East Fifteenth street, to Avenue J, to Coney Island avenue, to Avenue M, to East Tenth street, to Avenue P, to East Ninth street, to Quentin road, to East Eighth street, to Avenue P, to East Seventh street, to Quentin road, to Ocean parkway, to Avenue P, to East Fifth street, to Avenue O, to East Third street, to Avenue P, to East Second street, to Quentin road, to McDonald avenue, to Avenue O, to Dahill road, to Avenue P, to West Fifth street, to Sixty-fifth street, to Bay parkway, to Sixty-second street, to Twenty-first avenue, to Fifty-ninth street, to Nineteenth avenue, to Fifty-fifth street, to Seventeenth avenue, to Fifty-ninth street, to New Utrecht avenue, to Fifty-eighth street, to Fort Hamilton parkway, to Fifty-second street, to Twelfth avenue, to Forty-eighth street, to New Utrecht avenue, to Forty-seventh street, to Twelfth avenue, to Forty-third street, to Thirteenth avenue, to Thirty-seventh street, to Fourteenth avenue, to Thirty-ninth street, to Fifteenth avenue, to Thirty-eighth street, to Dahill road, to Ditmas avenue, to McDonald avenue, to Cortelyou road, to East Third street, to Church avenue, to East Fifth street, to Ditmas avenue, thence along said avenue to its intersection with Coney Island avenue, the point of beginning.

52. FIFTY-SECOND DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where the Kings-New York county line intersects Cadman plaza west extended, thence southerly along said line into the waters of Upper Bay, and through the waters of Upper Bay and Gowanus Bay to their intersection with Thirty-ninth street extended, thence along said street extended and said street, to Second avenue, to Thirty-sixth street, to Gowanus expressway, to Eighteenth street, to Fourth avenue, to Tenth street, to

Third avenue, to Eighth street, to Fourth avenue, to Seventh street, to Fifth avenue, to Fifth street, to Sixth avenue, to Sixth street, to Seventh avenue, to Fifth street, to Eighth avenue, to Third street, to Sixth avenue, to Union street, to Seventh avenue, to Berkeley place, to Sixth avenue to Lincoln place, to Seventh avenue, to St. Johns place, to Eighth avenue, to Flatbush avenue, to Sterling place, to Vanderbilt avenue, to Atlantic avenue, to Fifth avenue, to Warren street, to Fourth avenue, to Douglass street, to Third avenue, to Butler street, to Nevins street, to Baltic street, to Bond street, to Douglas street, to Hoyt street, to Dean street, to Smith street, to Bergen street, to Court street, to State street, to Boerum place, to Schermerhorn street, to Court street, to Cadman plaza west, to Orange street, to Henry street, to Cranberry street, to Cadman plaza west, to Henry street, to Poplar street, to Hicks street, to the Brooklyn-Queens expressway, to Cadman plaza west, thence northwesterly along Cadman plaza west, and Cadman plaza west extended to its intersection with the Kings-New York county line, the point of beginning.

70. SEVENTIETH DISTRICT. That part of the county of New York bounded by a line described as follows: Beginning at a point where West Ninety-seventh street intersects Central Park west, thence easterly through Central Park on said street, to Fifth avenue, to East One Hundred-tenth street, to Madison avenue, to East One Hundred-eleventh street, to Fifth avenue, to East One Hundred-fifteen street, to Madison avenue, to East One Hundred-twentieth street, to West One Hundred-twentieth street, to Mount Morris park west, to West One Hundred Twenty-second street, to Seventh avenue, to West One Hundred Twenty-third street, to Eighth avenue, to West One Hundred Twenty-seventh street, to Convent avenue, to West One Hundred Twenty-ninth street, to Amsterdam avenue, to West One Hundred

Thirty-fourth street, to Broadway, to West One Hundred Twenty-fifth street, to St. Clair place, thence along said place and said place extended to the New York-New Jersey line, thence southerly along said line to its intersection with West One Hundred Sixth street extended, thence along said street extended and said street, to West End avenue, to Broadway, to West One Hundred Eighth street, to Amsterdam avenue, to West One Hundred Seventh street, to Columbus avenue, to West One Hundred Fourth street, to Manhattan avenue, to West One Hundred-sixth street, to Central Park west, thence along Central Park west to its intersection with West Ninety-seventh street, the point of beginning.

71. SEVENTY-FIRST DISTRICT. That part of the county of New York bounded by a line described as follows: Beginning at a point where the One Hundred Forty-fifth street bridge intersects the New York-Bronx county line, thence westerly along said bridge to West One Hundred Forty-fifth street, to Lenox avenue, to West One Hundred Forty-sixth street, to Seventh avenue, to West One Hundred Forty-fifth street, to St. Nicholas avenue, to West One Hundred Forty-seventh street, to Convent avenue, to West One Hundred Forty-sixth street, thence westerly along said street and said street extended, to the New York-New Jersey line, thence southerly along said line to its intersection with St. Clair place extended, thence easterly along said place extended and said place, to West One Hundred Twenty-fifth street, to Broadway, to West One Hundred Thirty-fourth street, to Amsterdam avenue, to West One Hundred Twenty-ninth street, to Convent avenue, to West One Hundred Twenty-seventh street, to Eighth avenue, to West One Hundred Twenty-third street, to Seventh avenue, to West One Hundred Twenty-second street, to Mount Morris park west, to West One Hundred Twenty-fourth street, to Fifth avenue, to East One Hundred and Thirty-second street, to the New York-Central

railroad bridge, thence northerly along said bridge to its intersection with the New York-Bronx county line, thence northerly along said line to its intersection with the One Hundred Forty-fifth street bridge, the point of beginning.

§ 2. The descriptions of the eighteenth and twenty-third senate districts of section three of such chapter are hereby **REPEALED** and new descriptions of such districts are hereby inserted therein, in lieu thereof, to read, respectively, as follows:

18. EIGHTEENTH DISTRICT. That part of the county of Kings bounded by a line described as follows: Beginning at a point where Willoughby avenue intersects the Kings-Queens county line, thence westerly along said avenue to Irving avenue, to Starr street, to Central avenue, to Troutman street, to Evergreen avenue, to Troutman street, to Bushwick avenue, to Myrtle avenue, to Ditmars street, to Broadway, to De Kalb avenue, to Reid avenue, to Kosciusko street, to Broadway, to Ralph avenue, to Eastern parkway, to Rochester avenue, to Carroll street, to Ford street, to Crown street, to Utica avenue, to Lefferts avenue, to Troy avenue, to Carroll street, to Brooklyn avenue, to Lincoln place, to Albany avenue, to Sterling place, to New York avenue, to Fulton street, to Marcy avenue, to Hopkins street, to Tompkins street, to Flushing avenue, to Gerry street, to Harrison avenue, to Wallabout street, to Throop avenue, to Lorimer avenue, to Stagg street, to Leonard street, to Skillman avenue, to Lorimer street, to Jackson street, to Leonard street, to Frost street, to Lorimer street, to Richardson street, to North Eleventh street, to Driggs avenue, to North Tenth street, to Bedford avenue, to North Eleventh street, thence westerly along said street and said street extended to the Kings-New York county line, thence northerly along said line to its intersection with the Kings-Queens county line, thence easterly and southerly along said line to its intersection with Willoughby avenue, the point of beginning.

23. *TWENTY-THIRD DISTRICT.* That part of the county of Kings bounded by a line described as follows: Beginning at a point where Bedford avenue intersects North Tenth street, thence southerly along said avenue to North Eighth street, to Driggs avenue, to North Fourth street, to Bedford avenue, to Metropolitan avenue, to Driggs avenue, to South Fourth street, to Marcy avenue, to the Brooklyn-Queens expressway, to Grand avenue, to Myrtle avenue, to Adelphi street, to the Brooklyn-Queens expressway, to Prince street, to Flatbush avenue, to Wiloughby street, to Debevoise place, to De Kalb avenue, to Fulton street, to Hoyt street, to Fourth street, to Bond street and Bond street extended into the waters of the Gowanus canal, and through the waters of the Gowanus canal to their intersection with Second avenue extended, thence along said avenue extended and said avenue, to Sixth street, to Seventh avenue, to Union street, to Grand Army plaza west, to Grand Army plaza east, to Vanderbilt avenue, to Park place, to Washington avenue, to St. John's place, to Franklin avenue, to Washington avenue, to Lefferts avenue, to Brooklyn avenue, to Lincoln place, to Albany avenue, to Sterling place, to New York avenue, to Fulton street, to Marcy avenue to Hopkins street, to Tompkins avenue, to Flushing avenue, to Gerry street, to Harrison avenue, to Wallabout street, to Throop avenue, to Lorimer street, to Stagg street, to Leonard street, to Skillman avenue, to Lorimer street, to Jackson street, to Leonard street, to Frost street, to Lorimer street, to Richardson street, to North Eleventh street, to Driggs avenue, to North Tenth street, thence westerly along said street to its intersection with Bedford avenue, the point of beginning.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK

S. 11

A. 11

SENATE—ASSEMBLY

Extraordinary Session
May 30, 1974

IN SENATE—Introduced by COMMITTEE ON RULES
—(at request of the Joint Committee on Reapportionment)—read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY—Introduced by COMMITTEE ON RULES—(at request of the Joint Committee on Reapportionment)—read once and referred to the Committee on Rules

AN ACT

To amend the Reapportionment Compliance Act of nineteen hundred seventy-four, in relation to the description of the twenty-fifth senate district and to repeal the description relating to such district

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The description of the twenty-fifth senate district of section three of a chapter of the laws of nineteen hundred seventy-four, entitled "AN ACT to amend the state law, in relation to certain assembly and senate districts and to repeal the descriptions relating to such districts", constituting the Reapportionment Compliance Act of nineteen hundred seventy-four, is hereby REPEALED and a new description of such district is hereby inserted therein, in lieu thereof, to read as follows:

25. *TWENTY-FIFTH DISTRICT.* That part of the county of New York bounded by a line described as follows: Beginning at a point where the waters of the East river intersect East Fifteenth street extended, thence along said street extended and said street, to Franklin

D. Roosevelt drive, to East Fourteenth street, to Avenue A, to East Seventh street, to First avenue, to Houston street, to Eldridge street, to Stanton street, to Forsyth street, to Houston street, to Second avenue, to East First street, to Bowery, to Kenmore street, to Elizabeth street, to Broome street, to Bowery, to Park Row, to Pearl street, to Madison street, to Frankfurt street, to Gold street, to Fulton street, to South street, and thence southwesterly from South street to the waters of Upper Bay. Thence, southerly and easterly through the waters of Upper Bay to the waters of the East river, thence easterly and northerly through said waters to East Fifteenth street extended, the point of beginning, including all of Governors Island, Ellis Island and Liberty Island; and that part of the county of Kings bounded by a line described as follows: Beginning at a point where North Eleventh street extended intersects the Kings-New York county line, thence easterly along said street extended and said street to Bedford avenue, to North Eighth street, to Driggs avenue, to North Fourth street to Bedford avenue, to Metropolitan avenue, to Driggs avenue, to South Fourth street, to Marcy avenue, to the Brooklyn-Queens expressway, to Grand avenue, to Myrtle avenue, to Adelphi street, to the Brooklyn-Queens expressway, to Prince street, to Flatbush avenue, to Willoughby street, to Debevoise place, to De Kalb avenue, to Fulton street, to Hoyt street, to Fourth street, to Bond street and Bond street extended into the waters of the Gowanus canal, and through the waters of the Gowanus canal to their intersection with Second avenue extended, thence along said avenue extended and said avenue, to Sixth street, to Seventh avenue, to Prospect expressway, to Gowanus expressway, to its intersection with the waters of Gowanus creek, Gowanus bay, and Upper bay to their intersection with the Kings-New York county line, thence northerly along said line to its intersection with North Eleventh street extended, the point of beginning.

§ 2. This act shall take effect immediately.

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THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION.**

SEE FOLDOUT NO 1 & 2

Plaintiffs' Exhibit 3

INTERIM REPORT

of the

JOINT COMMITTEE ON REAPPORTIONMENT

* * * * *

INTRODUCTION

Sections 4 and 5 of the Federal Voting Rights Act of 1965, as amended in 1970, 42 U.S.C. §§ 1973b, 1973c, provide that in any state or political subdivision thereof which utilizes a test as a precondition for voting and in which less than 50% of persons of voting age voted in the 1968 Presidential Election, any changes in voting laws or procedures (including reapportionment plans) enacted since November 1, 1968 may not take effect until they have been approved by either the Attorney General of the United States or by the District Court in the District of Columbia.

On March 27, 1971, the United States Bureau of the Census determined that the Counties of The Bronx, Kings and New York were subject to the above provisions of the Voting Rights Act since a literacy test was used in those counties prior to 1970 as a precondition to voting and since less than 50% of the persons of voting age residing in those counties voted in the Presidential Election of 1968.

The Voting Rights Act permits a state or county that has become subject to its provisions to be exempted from the filing requirements of the Act by obtaining a declaratory judgment in the District Court for the District of Columbia adjudging that neither the purpose or effect of any test employed as a precondition for voting in the affected area was to deny or abridge any citizen's right to vote on account of race or color. The State of New

York brought such an action on behalf of The Bronx, New York and Kings Counties in December, 1971. After a four-month investigation into election procedures in the three affected counties, the Justice Department consented to the entry of the declaratory judgment sought by the State of New York and the District Court on April 13, 1972 issued an order granting the State's motion for summary judgment exempting the three affected counties from the filing requirements of the Voting Rights Act. *New York State v. United States*, D.D.C. Civil Action No. 2419-71.

In October, 1973, the Justice Department moved to reopen the declaratory judgment granted to the three affected counties on the ground that a decision by District Judge Charles E. Stewart in the Southern District of New York in the case of *Torres v. Sachs*, 73 Civ. 3921, had held that the failure of the New York City Board of Elections to provide a Spanish translation of the ballot violated the rights of Spanish-speaking citizens living in New York City in contravention of the Federal Voting Rights Act of 1965, as amended. The Justice Department's motion to reopen was granted by the District Court which on January 10, 1974 entered an order rescinding the previous declaratory judgment that had been granted to the State of New York and directed the State, on behalf of the three affected counties to comply with the filing requirements of § 5 of the Voting Rights Act. An application for a stay of that order was denied by the District Court and by the Supreme Court of the United States. Subsequently, on April 30, 1974, the District Court denied the motion of the State for summary judgment and entered a judgment dismissing the action for declaratory judgment.

The effect of the above proceedings has been to require the submission by the State of all voting laws and procedures, including reapportionment plans, that have been

enacted since November 1, 1968, to the Department of Justice insofar as they involve the Counties of The Bronx, Kings, and New York. On April 1, 1974 the Department of Justice issued a determination in which they approved fifty-one statutes involving changes in voting procedures, but refused to approve changes in certain assembly and State senate district lines in Kings and New York Counties and congressional district lines in Kings County on the grounds that while the purpose of those district lines might not have been to discriminate, the district lines had a racially discriminatory effect.

The effect of the Justice Departments ruling of April 1, 1974 under the provisions of the Voting Rights Act is to prevent any election from taking place in Kings and New York Counties under the district lines that have not been approved by the Justice Department.

While the Joint Legislative Committee on Reapportionment does not subscribe to the ruling of the Justice Department as expressed in the April 1 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time require that new legislation be enacted to satisfy immediately the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974. The necessary remedial legislation must be enacted in time to obtain Department of Justice approval prior to June 17 which is the first date at which designating petitions may be circulated for the 1974 primary elections.

The apportionment plan submitted was prepared to effect compliance with the United States Department of Justice determination of April 1, 1974. It is the opinion of this Committee that compliance with such determination must be achieved without violating the provisions of Article 3 of the New York State Constitution and Chapter 11 of the Laws of 1972 (insofar as such Law does not conflict with such April 1, 1974 determination). Also, the

Committee is of the opinion that to insure holding an orderly election it is appropriate to limit the confusion which generally results from the modification of legislative districts by minimizing both: (1) The number of legislative districts being altered and (2) The alteration within such districts. In so doing a minimal number of residents have been affected. The Committee was also concerned with the burden placed on the Boards of Election of Kings and New York Counties by effecting compliance with the Justice Department determination. Each of the boards necessarily must create, describe and map new election districts which have been altered by the proposed amendment. Once accomplished, new polling places must be secured, residents notified of changes in election districts, new registration lists prepared and various other procedures implemented as required by the election law. Most of these procedures must be completed prior to the first day for circulating designating petitions—June 17, 1974. The Committee is of the opinion that compliance with Federal and State standards has been achieved by the modification of only twenty-eight (28) districts, as follows:

TYPE	COUNTY	NUMBER OF DISTRICTS	NUMBER OF DISTRICTS MODIFIED
Congress	Kings	6 (5+1 partial)	4
Senate	Kings	10 (8+2 partial)	6
	New York	7 (4+3 partial)	2
Assembly	Kings	22 (21+1 partial)	12
	New York	13 (12+1 partial)	4
TOTAL			28

DISTRICTING

A—Kings County Congress. Apparently the Department of Justice has determined that the proportion of non-

white residents to white residents living within the Twelfth Congressional District resulted in a racially discriminatory effect, and it is therefore incumbent upon the Legislature to create more than one congressional district which would contain substantial majorities of non-white inhabitants. The population of the pre-existing Twelfth Congressional District was 89.9% non-white and 10.1% white. The adjacent Fourteenth Congressional District was 47% non-white and 53% white. By merging the geographical area of the Twelfth and Fourteenth Districts, and then dividing the merged area north to south (principally along Manhattan avenue, Leonard avenue, Lorimer street, Throop avenue, and Troy avenue) two districts were created, each having minority population in excess of 64%. Proposed District Twelve contains 46,726 persons of which 339,569 or 72.6% are non-white. Proposed District Fourteen contains 467,735 persons of which 302,157 or 64.6% are non-white. District Thirteen and Fifteen were nominally modified to reunite neighborhood communities which had been divided under a prior apportionment plan.

B—Kings County Senate. Under existing lines there is only one Senate district in Kings County which contains a substantial non-white majority (the Eighteenth). To overcome Justice Department objections, the Committee has attempted to create three senate districts which contain substantial non-white majorities. To do so the Committee:

(1) Joined the eastern portion of Senate District Eighteen, which is heavily non-white, with the moderately heavy non-white, northwest area of the Sixteenth Senate District and the heterogeneously populated southeastern portion of the Seventeenth Senate District. Proposed Senate District Seventeen contains over 234,985 non-white residents and the district is 77.1% non-white.

(2) Joined the western portion of Senate District Eighteen, which is heavily non-white, with the substantially non-white, northeastern portion of the Twenty-third Senate District, a major part of the Kings part of the Twenty-fifth Senate District, which is basically non-white and part of the Seventeenth Senate District. Proposed Senate District Twenty-three contains in excess of 216,147 non-white residents and the district is 71.1% non-white.

(3) Joined the remaining portion of the Eighteenth Senate District, which is heavily non-white, with substantially all of the remaining portion of the seventeenth Senate District which is primarily white. Proposed Senate District Eighteen contains over 219,186 non-white residents and the district is 72.1% non-white.

In order to devise the new non-white Seventeenth Senate District, the northwestern portion of the present Sixteenth Senate District was added to the Seventeenth Senate District. It was therefore necessary to add an equal number of persons from the present Nineteenth Senate District to the new Sixteenth Senate District to achieve a full population ratio. Similarly, the population removed from the present Nineteenth Senate District was restored to the new Nineteenth Senate District by adding thereto the remaining portion of the present Twenty-third Senate District (that part east and south of Prospect Park). The remaining unallocated, but contiguous area resulted in the new Kings County portion of the Twenty-fifth Senate District.

Senate Districts Twenty, Twenty-one, Twenty-two and Fifteen (Kings County portion) were not altered.

C—New York County Senate. The population of the Twenty-eighth Senate District is 57.6% non-white. The adjacent Twenty-ninth Senate District is 48.8% non-white. While the

the Twenty-eighth Senate District is presently represented by a non-white incumbent, the Justice Department is apparently of the opinion (contrary to their reasoning with respect to their determination concerning the Kings County Senate Districts) that the proportion of non-white to white residents residing within the present Twenty-eighth Senate District is inadequate, and thus effectively dilutes minority representation within New York County. While the Committee disagrees with this apparent reasoning, particularly in light of current election results and the increasing non-white population migrating into the present Twenty-ninth Senate District since 1970, it accedes, reluctantly, to the judgement of Mr. Pottinger. Thus, the Committee transferred that area of the present Twenty-eighth Senate District, bounded by West 112th street, Broadway, and West 131st street, to the proposed Twenty-ninth Senate District.

The area east of Seventh avenue, north of West 139th street and west of Lenox avenue, which is predominantly non-white, was then transferred from the Twenty-ninth Senate District to the Twenty-eight Senate District. This change results in the proposed Twenty-eighth Senate District having non-white population of 200,033 or 65.8%. However, the proposed Twenty-ninth Senate District's non-white population has been reduced to 45.9%.

It is the opinion of the Committee that not only are the present Senate lines in New York County fully in compliance with Federal Constitutional standards, but that any modification of existing lines would tend to effectively dilute minority opportunity for the remainder of the decennial period (1982) during which the present apportionment shall control.

D. Kings County Assembly. There are twenty-two assembly districts within Kings County. Of these the populations of 6 are over 60% and 1 district contains a population which is over 50% non-white. Five districts are represented in the legislature by non-whites.

Apparently the Justice Department has determined that the present apportionment within Kings County unnecessarily consolidates the non-white population into Black Assembly districts, and therefore results in a racially discriminatory effect. Therefore, to achieve compliance, it was necessary to transfer non-white populated areas from those "consolidated" non-white assembly districts into adjacent areas having less than a substantial majority of non-whites.

The Committee first determined which presently existing assembly districts already contained substantial, but less than sufficient majorities of non-white residents. Present Assembly Districts Fifty-seven and Fifty-nine contained 61% and 52% non-white populations respectively, and are adjacent to existing heavily populated minority districts, to wit: the Fifty-sixth and Fifty-fifth. Thus by transferring non-white areas from the present Fifty-sixth and Fifty-fifth Assembly Districts into the present Fifty-seventh and Fifty-ninth Assembly Districts, and thereafter transferring heavily white populated areas from the present Fifty-seventh and Fifty-ninth Assembly Districts, two additional non-white assembly districts are created. These exchanges have been accomplished without reducing the substantial non-white pluralities of the pre-existing minority assembly districts. The Committee therefore has been able to draw five assembly districts having a non-white population of over 75% and two additional assembly districts having a non-white population of over 65%.

To accomplish this the northeast triangle of the Fifty-seventh Assembly District, an area which does not contain heavy concentrations of minority residents, was transferred into the Fifty-sixth Assembly district and areas of the Fifty-sixth and Fifty-second Assembly Districts containing heavy concentrations of minority residents were transferred into new Assembly District Fifty-seven. Proposed Assembly District Fifty-seven contains over 78,499 non-white inhabitants and the district is 65.0% non-white.

Because of the above modifications, present Assembly District Fifty-two did not contain a full ratio of apportionment. This could be remedied in only two ways. A sufficiently populated area of the northern portion of the Fifty-first Assembly District or a comparably populated area of the northwest portion of the Forty-fourth Assembly District could be transferred to the Fifty-second Assembly District. The Committee chose to transference the northwest portion of the Forty-fourth Assembly District to the Fifty-second Assembly district for several reasons. The northern portion of the present Forty-fourth Assembly District was contiguous with its southern portion solely by reason of Prospect Park, a condition which elicited oral criticism from representatives of the Justice Department because of the heavily Black population residing north of Prospect park. In addition, the present Fifty-third Assembly District extended across both sides of Eastern parkway, a major Brooklyn highway and could be redesigned into a more compact shape by extending its western boundary to the eastern boundary of the proposed Fifty-second Assembly District and by moving the southern boundary northerly to Eastern parkway. The area transferred from the present Forty-fourth Assembly District replaced by that portion of the present Fifty-third Assembly District line south of Eastern parkway and west of New York avenue. Since the population within this part of the present Fifty-third Assembly District, the northern portion of the present Fifty-first Assembly District. The population disparity resulting from such transfer was corrected by transferring minor portions of the present Fifty-second Assembly District, (done in such manner as to effectively straighten the common boundary between the Fifty-first and Fifty-second Assembly Districts) together with seven blocks from the Fiftieth Assembly District.

In order to further overcome the objections raised with respect to the presently "elongated" Forty-fourth

Assembly District, the Committee transferred the southern portion of the Forty-fourth Assembly District, which lies principally south of Foster avenue into the proposed Forty-eighth Assembly District and the northeastern portion of the Forty-eighth Assembly District was moved into the proposed Forty-fourth Assembly District. The resulting Forty-fourth Assembly District is considerably more compact than as it previously existed. These transfers also effectively united homogeneously related areas of the present Fifty-third Assembly District and Forty-fourth Assembly District.

At this point the proposed Forty-eighth Assembly District did not contain sufficient population, and it was therefore necessary to transfer the northeast portion of the Forty-seventh Assembly District to the proposed Forty-eighth Assembly District. Since this transfer was necessary, it was decided appropriate to recreate the proposed Forty-seventh Assembly District in as compact a shape as possible. Therefore, shift of geographical areas between the Forty-seventh Assembly District and the Forty-eighth Assembly District were made.

The Forty-ninth Assembly District was modified to provide a sufficient population ratio for the proposed Fiftieth Assembly District (which necessarily lost a nominal seven block area to the proposed Fifty-first Assembly District in order to effect closure).

At this point, the Fifty-sixth, Fifty-third and Fifty-fifth Assembly Districts were still very heavy minority districts. In order to complete a population ratio, however, a small portion of the present Fifty-fifth Assembly District was added to the proposed Fifty-sixth Assembly District.

The proposed Fifty-ninth Assembly District was formed by adding the northern half of the present Fifty-fifth Assembly District to the northern half of the present Fifty-ninth Assembly District, and by adding a nominally heavy

minority portion of the present Fifty-sixth Assembly District. This resulted in the formation of a second new minority district.

The proposed Fifty-fifth Assembly District was formed by adding the southern portion of the present Fifty-fifth Assembly District to the southern portion of the present Fifty-ninth Assembly District.

Present Assembly Districts Thirty-eight, Thirty-nine, Forty, Forty-one, Forty-two, Forty-three, Forty-five, Forty-six, Forty-four and Fifty-eight have not been altered.

E. New York County Assembly. The Justice Department's adverse determination was principally based on the ethnic composition of the elongated Seventy-first Assembly District. Apparently it was the opinion of the Justice Department that the resulting Seventieth, Seventy-second, and Seventy-fourth Assembly Districts overly consolidated non-white communities, and therefore the 1971 apportionment plan had a racially discriminatory effect. It was immediately apparent to the Committee that compliance could be achieved with minimal alteration by merely consolidating the combined geographic area of the Seventieth, Seventy-first, Seventy-second and Seventy-fourth Assembly Districts and thereafter designing four assembly districts solely within that area. This of course resulted in leaving unaltered the nine remaining Assembly Districts within New York County. The Committee further concluded that in order to satisfy the objections of the Justice Department, it would be necessary to violate the long established traditional Assembly District patterns in northern Manhattan by creating Assembly Districts running from the Hudson River to the East or Harlem River. Therefore the proposed Seventy-fourth Assembly District is bounded on the north by the southern boundary of the present Seventy-third Assembly District. The southern boundary of the proposed Seventy-fourth is principally 146th street and 145th street. It con-

tains in excess of 84,000 non-white residents and is 69.3% non-white.

The Seventy-first Assembly District was formed conceptually in the same manner. Its southern boundary is principally 125th, 130th, 127th, 126th, and 132nd street and the district runs river to river. The proposed Seventy-first Assembly District contains approximately 110,000 non-white inhabitants and 89.5% non-white.

Due to the substantial Puerto Rican population residing along the East and Harlem River the Committee determined it appropriate to consolidate as much of the population of Puerto Rican extraction as possible. Therefore the Committee devised the Seventy-second Assembly District principally by drawing its western boundary along Fifth avenue. The proposed Seventy-second Assembly District contains a minority population in excess of 100,000 non-whites and it is 82.7% non-white. Specifically, the Black population within the proposed Seventy-second Assembly District is 49,903 or 40.8% and the Puerto Rican population is 49,291 or 40.3%.

The proposed Seventieth Assembly District is constituted by the remaining unallocated area. Its population is over 85,000 non-white and it is 72.2% non-white. The proposed districting results in the creation of four minority districts.

PARTICIPATION

Due to the extremely short period available to the Committee for completing its work and the countless hours required in effecting compliance with the New York State Constitutional block on the border rule, the Committee was unable to hold Public Hearings. However, participation by any legislator, individual, public or special interest group was most welcome. The Committee has received either directly or through the Attorney General's office numerous

suggested districting plans. While many of these were merely suggested responding specific Assembly, Senate or Congressional Districts, the Committee staff platted every suggestion received. This information was of substantial assistance to the Committee, particularly with respect to policy determinations.

For example, a Mr. Ron Alheim presented to the staff two suggested assembly districting plans for New York County. One plan altered each assembly district in New York County which is unnecessary, and therefore was rejected. The second plan was most helpful to the Committee. The principal differences between the second plan and that recommended by the Committee are:

- (1) It did not create districts of equal population.
- (2) It failed to comply with Constitutionally mandated block on the border requirements.

The NAACP transmitted its general suggestions by letter to the Attorney General. Neither specific descriptions or maps were received by the Committee. However, the general considerations contained in Mr. Schnapper's letter were seriously considered and to the extent possible were implemented conceptually into the proposed plan.

Councilman Samuel Wright forwarded specific descriptions of non-white Congressional, Senate and Assembly districts for Brooklyn. These descriptions were plotted on maps and population counts were taken. The population of the individual districts, once plotted, was inaccurate. The principle objection, however, was the failure by Mr. Wright to complete a districting plan for the entire county, which would require redrawing all of the districts within Kings County. This the Committee did not feel appropriate. Notwithstanding this, the Committee is of the opinion that the policies and concepts set forth in the plan presented by Mr. Wright have been carried forward into the recommended redistricting.

Numerous other suggestions were received by the Committee and in like matter each was seriously considered.

It is the opinion of the Committee that the proposed amendment constitutes a fair and reasonable Congressional, Senate and Assembly districting which is in concert philosophically and conceptually with substantially all of the suggestions forwarded to the Committee.

CONCLUSION

While in disagreement with its determination, the Committee wishes to express its gratitude to the Department of Justice and the members of its staff who have conscientiously cooperated fully with the staff of the Joint Committee on Reapportionment. Each staff has been in relatively constant communication by conference, mail or telephone. It is important to state however, that the principal purpose of such communication was to more clearly define and establish the guidelines which necessarily had to be followed in order to effect compliance. The Department of Justice has not finally reviewed the proposals of the Committee in accordance with their established procedures and will not do so until such time as a proposed amendment is enacted into law. Due to such continued communication and the data already furnished to the Justice Department a final determination can be made sufficiently in time to meet the June 17, 1974 date for commencing the circulation of designating petitions.

Chapter 11 of the Laws of 1972 was previously the subject of extensive litigation in the State Courts. The districting plans set forth in such Law (and currently in effect) was found to be in compliance with the United States and State Constitution (*Schneider v. Rockefeller* 31 N.Y. 2d 420 [1972]).

The statutory authority granted to the Justice Department, exercised at a time immediately prior to the general

election, effectively made it impossible for the State of York to seek judicial review. In this instance, the State, while being afforded a right to judicial review is unable to secure a remedy due to the immediacy of the election. It is the opinion of the Committee that if judicial review was available within the time permitted, the existing apportionment would be held valid. It is further the opinion of the Committee that the proposed apportionment plans as set forth in uni-bills S1;A1 and S2;A2 are fully in compliance with the United States Constitution, the New York Constitution and the April 1, determination of the United States Department of Justice.

Respectfully submitted,

Hyman M. Miller, Chairman Fred Droms, Jr.

Jay P. Rolison, Jr. James L. Emery
Vice-Chairman

Thomas R. Fortune, Secretary Leonard Silverman

John D. Caemmerer Ronald B. Stafford

John D. Calandra Chester J. Straub

APPENDIX A—ASSEMBLY DISTRICT FORMATION.

ASSEMBLY DISTRICT	DISTRICT POPULATION	DEVIATION FROM STATE MEAN 121,608	DISTRICT FORMATION
44	120,768	— .006907	Wholly within the county of Kings.
47	120,768	— .006907	Wholly within the county of Kings.
48	120,768	— .006907	Wholly within the county of Kings.
49	120,768	— .006907	Wholly within the county of Kings.
50	120,768	— .006907	Wholly within the county of Kings.
51	120,768	— .006907	Wholly within the county of Kings.
52	120,907	— .006907	Wholly within the county of Kings.
53	120,768	— .006907	Wholly within the county of Kings.
55	120,768	— .006907	Wholly within the county of Kings.
56	120,768	— .006907	Wholly within the county of Kings.
57	120,678	— .006907	Wholly within the county of Kings.
59	120,768	— .006907	Wholly within the county of Kings.
70	122,312	+ .005789	Wholly within the county of New York.
71	122,312	+ .005789	Wholly within the county of New York.
72	122,312	+ .005789	Wholly within the county of New York.
74	122,312	+ .005789	Wholly within the county of New York.

APPENDIX B.—ASSEMBLY DISTRICT EVALUATION.

Assembly	
State Mean (Apportionment Ratio)	121,608
Largest District	123,814
Smallest District	119,691
Population Variance Between Largest and Smallest District	1.034 to 1
Maximum Deviation From State Mean	+ .018140
Minimum Percent of Population Required to Elect a Majority of Assembly Representatives (Based on 76 vote majority)	50.3%

Note to Appendix B: The above statistics have not been affected by the modifications of the districts presented in this report. These statistics are identical to those presented in the Interim Report dated December 14, 1971.

APPENDIX C—SENATE DISTRICT FORMATION.

SENATE DISTRICT	DISTRICT POPULATION	DEVIATION FROM STATE MEAN 304,021	DISTRICT FORMATION
16	304,003	— .000059	Wholly within the county of Kings.
17	304,002	— .000062	Wholly within the county of Kings.
18	304,003	— .000059	Wholly within the county of Kings.
19	304,003	— .000059	Wholly within the county of Kings.
23	304,003	— .000059	Wholly within the county of Kings.
25	304,002	— .000062	Part of the county of Kings (152,472) and part of the county of New York (151,530).
28	304,001	— .000066	Wholly within the county of Kings.
29	304,001	— .000066	Wholly within the county of Kings.

APPENDIX D—SENATE DISTRICT EVALUATION.

SENATE	
State Mean (Apportionment Ratio)	304,021
Largest District	306,798
Smallest District	301,225
Population Variance Between Largest and Smallest District	1.018 to 1
Maximum Deviation From State Mean	— .009196
Minimum Percent of Population Required to Elect a Majority of Senate Representatives (Based on 31 vote majority)	51.6%

Note to Appendix D: The above statistics have not been affected by the modifications of the districts presented in this report. These statistics are identical to those presented in the Interim Report dated December 14, 1971.

APPENDIX E—CONGRESSIONAL DISTRICT FORMATION.

CONGRESSIONAL DISTRICT	DISTRICT POPULATION	DEVIATION FROM STATE MEAN 467,725	DISTRICT FORMATION
12	467,726	+ .000002	Wholly within the county of Kings.
13	467,726	+ .000002	Wholly within the county of Kings.
14	467,735	+ .000021	Wholly within the county of Kings.
15	467,741	+ .000034	Wholly within the county of Kings.

APPENDIX F—CONGRESSIONAL DISTRICT EVALUATION.

CONGRESSIONAL

State Mean (Apportionment Ratio)	467,725
Largest District	467,984
Smallest District	467,219
Population Variance Between Largest and Smallest District	1.0016 to 1
Maximum Deviation From State Mean	-.001081
Minimum Percent of Population Required to Elect a Majority of Congressional Representatives (Based on 20 vote majority)	51.2724%

Note to Appendix F: The above statistics have not been affected by the modifications of the districts presented in this report. These statistics are identical to those presented in the Interim Report dated March 5, 1972.

APPENDIX K—CRITERIA FOR ESTABLISHING ETHNIC COMPOSITION, KINGS ASSEMBLY.

	White	Black	Puerto Rican	Other
<i>A.D. 40</i> (76.1% non-white) 120,768	23.9%	55.8%	19.9%	.4%
<i>A.D. 53</i> (85.5% non-white) 120,768	14.5%	78.5%	5.6%	1.3%
<i>A.D. 54</i> (86.2% non-white) 120,768	13.8%	67.6%	18.3%	.2%
<i>A.D. 55</i> (81.4% non-white) 120,768	18.6%	64.4%	16.5%	.5%
<i>A.D. 56</i> (88.1% non-white) 120,768	11.9%	74.6%	13.1%	.4%
<i>A.D. 57</i> (65.0% non-white) 120,768	35.0%	41.1%	22.1%	1.7%
<i>A.D. 59</i> (67.5% non-white) 120,768	32.5%	36.1%	31.2%	.3%

APPENDIX L—CRITERIA FOR ESTABLISHING
ETHNIC COMPOSITION, NEW YORK ASSEMBLY.

	White	Black	Puerto Rican	Other
<i>A.D. 70</i> (72.2%)	27.8%	61.5%	8.6%	2.1%
non-white) 122,312	34,003	75,222	10,519	2,569
<i>A.D. 71</i> (89.5%)	10.5%	80.5%	7.8%	1.2%
non-white) 122,312	12,843	98,461	9,540	1,468
<i>A.D. 72</i> (82.7%)	17.3%	40.8%	40.3%	1.7%
non-white) 122,312	21,160	49,903	49,291	2,079
<i>A.D. 74</i> (69.3%)	30.7%	59.0%	8.9%	1.3%
non-white) 122,312	37,550	72,164	10,886	1,590

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74 C 877

[Caption omitted]

Notice of Motion

Sirs:

PLEASE TAKE NOTICE that, on the complaint and previous proceedings herein, the undersigned will move this court on June 1974, at , or as soon thereafter as counsel can be heard for an Order pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure dismissing the Complaint for failure to state a claim upon which relief can be granted.

Dated: New York, New York
June 19, 1974

Yours, etc.,

/s/ [Illegible]

JACK GREENBERG

ERIC SCHNAPPER

Suite 2030

10 Columbus Circle

New York, New York 10019

Counsel for N.A.A.C.P., etc., et al.

**Memorandum in Opposition to Approval of
Chapters 11, 76, 77 and 78
New York Laws of 1972**

Introduction

Section 5 of the Voting Rights Act requires that the Attorney General interpose an objection to Chapters 11, 76, 77 and 78 unless he determines that those provisions do not have the purpose and will not have the effect of discriminating on the basis of race. 42 U.S.C. § 1973c. The burden of proof is on the submitting authority to establish that the new statutes lack a discriminatory purpose of effect. 28 C.F.R. § 51.19.

The standard of proof in these proceedings is different than it would be in a constitutional challenge to Chapters 1, 76, 77 and 78; the submitting authority is required to prove more than that those provisions do not violate the Fourteenth and Fifteenth Amendments. As the Supreme Court has repeatedly recognized, the Voting Rights Act was enacted with the express purpose of raising the standard which must be met by election laws, because Congress had concluded, after extensive inquiry, that suits under the Fourteenth and Fifteenth Amendments had proved inadequate, *South Carolina v. Katzenbach*, 383 U.S. 301, 309-315 (1966); *Allen v. Board of Elections*, 393 U.S. 544, 556 n. 21 (1969). In its letter of February 22, 1974, to Mr. Pottinger, New York referred to a series of cases enunciating the standard for determining whether a statute violates the Fourteenth and Fifteenth Amendments; the standard announced in those decisions is not merely inapplicable here, it is the very standard which Congress rejected in enacting the Voting Rights Act.

The Voting Rights Act requires, inter alia, that the submitting authority establish that a redistricting plan does not have the purpose of discriminating on the basis of race.

constitutional standard, the standard *rejected* by Congress, would be met in most instances merely by showing an absence of racial remarks during the legislative debates, no matter how peculiar their resulting lines. See *Wright v. Rockefeller*, 376 U.S. 52 (1964). Manifestly the Attorney General must require a greater showing than that in a section 5 proceeding, or the "purpose" clause of the Voting Rights Act would be a dead letter. We would urge that, in the case of a redistricting plan the submitting authority to establish non-discrimination in purpose must show (a) that the method by which the lines were drawn was well designed to assure the absence of any discriminatory purpose, and (b) that under the resulting lines the proportion of non-white votes diluted by being placed in majority white districts was no greater than the proportion of white votes diluted by being placed in majority non-white districts, and (c) to the extent that the submitted district lines carry forward features of earlier districting plans, that those earlier plans did not have a discriminatory purpose. In the instant case none of these standards have or can be met.

Section 5 review is triggered by the enactment or adoption of a new election law or procedure. In determining whether that law or procedure has a discriminatory effect, it is the usual practice to first compare the effect of the law or practice with the law or practice which it replaces, since the old law or practice could and would continue in effect if the new law or practice were disapproved. The situation is different when redistricting is involved, for shifts in population have rendered the pre 1972 district lines invalid, and there is no "old" law to which to revert if the new law is disapproved. When time and changes in population have invalidated an old districting plan, the legislature which prepares a new plan writes on a *tabula rasa*, and the effect of the new plan must be assessed in terms of all possible alternatives. Where, as here, the old

district lines were themselves discriminatory, the Voting Rights Act requires, not merely that the 1972 lines be no more discriminatory than the 1968 lines, but that the 1972 lines not be discriminatory at all.

Authority To Make Submissions

When a county rather than entire state is covered by the Voting Rights Act, submission under Section 5 must be made by the county rather than by the state. The distinction is of importance because the submitting authority must represent that the changes submitted do not have a discriminatory purpose or effect. When the officials authorized to submit a law conclude that that law is discriminatory, the officials have an obligation to refuse to submit the law since they cannot in good faith make the required representations. Such a refusal would preclude federal approval of those alterations in election laws or procedures.

In the instant case the chief elected officials in the counties involved are the Borough Presidents. Chapters 11, 76, 77 and 78 have been submitted, not by the Borough Presidents, but by the State Attorney General. In two of the counties, New York and Bronx, the Borough Presidents have expressly denied to the Attorney General any authority to make submissions on their behalf; the position of the third Borough President is not known. We believe that, in view of these considerations, Chapters 11, 76, 77 and 78 have not been validly submitted in accordance with the Voting Rights Act and the regulations thereunder. The Attorney General need not resolve this question, however, since these Chapters must in any event be disapproved on their merits.

Historical Background

The key obstacle to Black and Puerto Rican participation in the political process in New York, Bronx, and Kings

Counties has for several decades been the efforts of white officeholders despite the constantly growing non-white population. Between 1960 and 1970 alone, the non-white population rose from 25.1% to 34.8% of New York County, from 14.5% to 36.6% in Kings County, and from 11.8% to 31.9% in Bronx County.

The Black and Puerto Rican population in the three counties has been largely confined to ghettos in each of the counties: Harlem and the Lower East Side in New York County, the South Bronx in Bronx County, and Bedford Stuyvesant and certain contiguous areas in Kings County. This confinement is largely the result of housing discrimination and of the unusually high incidence of poverty among Blacks and Puerto Ricans.

At the time when the non-white population began its rapid growth, as now, most parts of the three counties were so overwhelmingly Democratic that Republicans could not be elected to local office. Accordingly the politics which mattered to Blacks and Puerto Ricans was and is Democratic Party politics. Throughout this period of growth the white political leadership in the Democratic Party has been divided into two loose factions, known locally as the "regulars" or the "organization," and the "reformers." The Democratic County Chairmen in all three counties are still regulars but reform candidates have succeeded within the last decade in capturing most of the public offices in New York County, and making significant inroads in Kings and Bronx Counties.

It became apparent at an early date that, if non-whites became a majority or any district, they would unseat the white incumbent and elect a Black or Puerto Rican. Conversely, a minority candidate could not, as a general rule, be elected in a district with a white majority. As the Black and Puerto Rican population grew in the 1950's and 1960's, it began to imperil the districts of incumbent white

legislators in the ghetto areas, virtually all of whom, at the time, were regulars.

Far more was and is at stake than the Senators, Assemblymen and Congressmen obviously affected. The whole elaborate apparatus of patronage and gratuities in New York City is structured around the Assembly, Senate and Congressional Districts. The key figure in each neighborhood varies. Most often it is the elected party Assembly District Leader, chosen during primaries every two years, whereas Congressmen are less often involved. Election to any local party or public office carries with it the ability, in varying degrees, to participate in the following activities (1) Distribution of patronage jobs. Every year a substantial number of city and state jobs are awarded through the party infrastructures. Because of the cordial relations between the two major parties, a certain number of such jobs are given by the Mayor and Governor to members of the opposing party. Patronage jobs within the city have traditionally been particularly common in the Board of Elections and in the Departments of Purchase and Sanitation; the state hands out several million dollars a year to part time employees in "no-show" jobs. (2) Distribution of Surrogate Court work.

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the individual involved. Firms and individuals doing business with the City commonly give some business—in the form of retainers, insurance purchases etc.—to political leaders and public officials in the hope of favorable treatment. At times those expectations are well founded. Similarly, such officials and leaders can expect an edge in doing business with the city and state; millions of dollars of public funds are deposited each year, for example, in interest free accounts in banks in which political leaders are involved. Also, through the practice may have declined in recent years, individuals who obtain, or seek to obtain, jobs through political leaders and public officials occasionally make personal or political contributions in return for, or expectation of, that employment.

All these activities are of particular importance to the Democratic and Republic Party County Chairmen in New York City. These Chairmen are in a position to exercise the greatest amount of influence over patronage, Surrogate Court work, judgeships, and gratuities. For a county chairman inclined to do so, his position can be financially rewarding. Since the County Chairmen are elected by the Assembly District Leaders, they are vitally interested in the way that Assembly District lines are drawn.

Rather than accept the election of Blacks and Puerto Ricans and the defeat of their own candidates, White officials in the last several decades resorted to a variety of strategies. Black and Puerto Rican candidates and insurgent organizations were dissuaded from opposing white incumbents by offers of patronage or future support. When a non-white candidate did run against a white incumbent, the incumbent or his supporters frequently persuaded another non-white candidate to run and split the Black and Puerto Rican vote. And, where feasible, district lines were gerrymandered to prevent the defeat of white candidates.

This strategy generally succeeded in minimizing the political influence of non-white voters. The first non-white

State Senator was not elected in Kings County, for example, until 1964. Prior to 1968 there still was not a majority non-white Congressional District in Kings County, the large Bedford-Stuyvesant ghetto being divided among five majority white districts. As a result of federal litigation the Congressional Districts in Kings County were redrawn in 1968, and a majority non-white district was created. That district, the 12th, has been represented since its creation by Congresswoman Shirley Chisholm. In New York and Kings County racial gerrymandering has, for geographical reasons, been far more difficult to accomplish. Once a non-white majority becomes established in a district in any county, the white factions of the Democratic Party endorse and support non-white candidates, and abandon any effort to elect whites.

Legislative History

The materials which you have received from New York suggest that the submitted lines were drawn by the Joint Legislative Committee on Reapportionment. That is not the case.

The district lines at issue were drawn by the Republican and Democratic chairmen of the three counties involved. First, the Republican chairman in each county was allowed to draw whatever lines he wanted to further the prospects of Republicans. The Republican chairmen are Joseph Caltandra in Bronx County, Vincent Albano in New York County, and George Clark in Kings County. In general the Republican chairmen were interested in very few of the lines, since all three counties are so heavily Democratic that Republicans cannot win no matter how the districts are shaped. Second, the remaining lines in each county were drawn by the Democratic county chairmen. The Democratic chairmen are Patrick Cunningham in Bronx County, Frank Rossetti in New York County, and Meade Esposito in Kings County. It is our understanding that the map drawing was

done either in the private offices of the county chairmen or the party county headquarters. In the past private hotel rooms have been used. The role of the staff of the Joint Committee was limited largely to making technical adjustments to assure districts of comparable size.

We were not of course privy to the political discussions and deals in which these political chairmen were involved. A number of incidents have come to light which indicate the general tenor of the considerations involved. (1) In the plans initially drafted, it was contemplated that the Hassidic Jewish community in Crown Heights, which is surrounded by Blacks and Puerto Ricans, would have to be in a majority non-white Assembly district. When word of this reached that white community, it produced a storm of protest at the possibility of being represented by a Black Assemblyman. Accordingly, a corridor was created through the minority areas to include Crown Heights in 41st Assembly District which, not coincidentally, is represented by the Democratic leader of the State Assembly. (2) In the plans initially drafted, it was contemplated that, because of the increase in Black and Puerto Rican population, an additional majority non-white Assembly District would have to be created. It was contemplated that this be done by redrawing the districts so that the 44th Assembly District would have a non-white majority, a decision reflecting the relative power of the various Assemblymen. This decision, however, was also overturned by pressure from the white community which would have been in the new district. (3) White incumbents whose districts had a growing Black and Puerto Rican population requested adjustments to prevent the growth from yielding a majority non-white district. The extent to which such relief was afforded reflected, *inter alia*, the political influence of the incumbent.

As this situation developed, a substantial effort was made by Black and Puerto Rican legislators to thwart the impending gerrymandering. In December of 1971 those legis-

lators refused to vote for Governor Rockefeller's tax package unless they were guaranteed that redistricting would assure, at the very least, that there was an additional majority non-white congressional district in Brooklyn. This refusal was sufficient, under the then existing circumstances, to prevent passage of the tax measures. The Black and Puerto Rican legislators met with the Governor to seek his help, help which would have been critical since there was a Republican majority in both houses of the legislature. The Governor explained he would not help since he owed several favors to the Kings County Democratic chairman, Meade Esposito, in return for key legislative support Esposito had provided in earlier matters. Several legislators then met with Esposito, who gave them certain vague assurances, and in return the tax package was enacted. Subsequently, however, the redistricting was enacted in the form which the minority legislators had opposed.

We maintain that this legislative process was so fraught with potential for abuse as to require the Attorney General to object to the submitted lines. The critical decision whether to permit the creation of majority non-white districts, districts which would have assured the defeat of white incumbents, was in the hands of the white county chairman chosen by and accountable to those very incumbents. One cannot readily conceive of a system more likely to assure that as many Blacks and Puerto Ricans as possible would be placed in majority white districts so as to protect the interests of white incumbents. Nor can one identify individuals with a greater personal, financial and political interest in such discrimination than the county chairman who drew the instant lines. The method by which these lines were prepared was so tainted with potential for prejudice as to preclude the Attorney General from concluding that they did not have the purpose of discriminating on the basis of race. Compare *Tumey v. Ohio*, 273 U.S. 510 (1927).

Racially Polarized Voting

Racially polarized voting, the overwhelming tendency of white voters to vote against Black or Puerto Rican candidates, is a well established fact of political life in New York. Black and Puerto Rican candidates rarely if ever run in districts with solid white majorities. White candidates rarely if ever run in districts with solid Black and Puerto Rican majorities. No Puerto Rican or Black has ever been elected to statewide office. No Puerto Rican or Black has ever been elected to a city-wide office in New York City. With the exception of the Borough President of Manhattan, who ran unopposed, not a single majority white district in New York City is currently represented by a Black or Puerto Rican office holder.

Races between white and non-white candidates are largely limited to formerly safe majority white districts in which the Black and Puerto Rican population has risen to or is approaching a majority. In such areas a serious challenge to the white incumbent is usually made by a Black or Puerto Rican candidate. A recent such example was the 1972 Democratic primary for Assembly in the 57th District in Brooklyn. This district was 50.1% non-white in 1970, with a somewhat smaller but rising voting age proportion. In 1972 the white incumbent, Harvey Strelzin was challenged by a Black candidate, (Name not clear). The north east portion of the district, in election districts 1-13, is overwhelmingly white. The rest of the district, encompassing the Fort Greene area, is predominantly Black and Puerto Rican, though more integrated than the white areas. The Black challenger won 27 of the 43 election districts, but lost the election because he was beaten by a margin of almost 10 to 1 in the white community.

Table A

1972 Democratic Primary: 57th Assembly District

ED	Strelzin (white)	Greenidge (black)	Strelzin per cent
1	89	24	77.8%
2	94	45	67.6%
3	275	21	93.2%
4	138	55	71.6%
5	196	7	96.5%
6	196	76	71.6%
7	157	19	89.3%
8	158	26	86.0%
9	265	13	95.2%
10	178	49	78.5%
11	20	4	83.5%
12	121	45	73.0%
13	73	8	90.2%
14	48	148	24.4%
15	74	95	43.7%
16	90	91	50.3%
17	76	63	31.6%
18	0	1	0%
19	66	74	97.0%
20	14	44	24.2%
21	79	161	32.9%
22	29	106	20.4%

ED	Strelzin (white)	Greenidge (black)	Strelzin per cent
23	63	76	45.3%
24	13	89	12.7%
25	47	73	39.1%
26	64	214	23.0%
27	68	89	42.6%
28	34	166	17.0%
29	71	100	41.5%
30	20	71	22.0%
31	76	86	45.8%
32	73	88	45.3%
33	67	87	42.5%
34	37	173	17.6%
35	21	33	38.9%
36	21	71	22.8%
37	60	90	50.0%
38	43	36	54.4%
39	88	115	92.3%
40	30	33	47.6%
41	16	17	48.5%
42	2	2	50.0%
43	5	5	50.0%
Total	3352	2889	53.8%

A similar pattern is revealed by the primary run-off for Mayor held in June 1973 between Abraham Beame, a white candidate from Brooklyn, and Herman Badillo, a Puerto

Rican candidate from the Bronx. The racial voting patterns were complicated by ideological and age differences between the candidates; Beame, in his sixties, was generally regarded as conservative, whereas Badillo, in his forties, was regarded as liberal. Notwithstanding these differences, and variations in white and non-white turnout, the pattern of racial voting was unmistakable.

Table B
Mayoral Primary Runoff: 1973

Assembly District	Badillo Vote	Rank by Badillo Vote	Non-white Population	Rank By non-white Population
77	91.7%	1	59.1%	11
79	88.2%	2	60.4%	10
55	80.7%	3	79.3%	4
70	80.5%	4	75.0%	5
78	79.8%	5	70.6%	8
75	76.5%	6	54.0%	12
54	73.5%	7	73.9%	6
53	71.9%	8	84.2%	2
56	70.2%	9	86.0%	1
72	69.4%	10	71.4%	7
59	68.9%	11	41.9%	17
69	67.9%	12	27.5%	23
71	67.8%	13	44.0%	16
40	65.5%	14	64.8%	9
64	63.4%	15	12.4%	36

Assembly District	Badillo Vote	Rank by Badillo Vote	Non-white Population	Rank By non-white Population
74	63.3%	16	84.2%	2
57	59.8%	17	50.1%	13
68	59.5%	18	17.6%	31
67	57.7%	19	16.7%	32
76	57.6%	20	45.4%	15
63	57.5%	21	39.4%	18
66	55.4%	22	2.4%	43
52	52.5%	23	27.1%	24
85	49.0%	24	31.3%	20
65	48.3%	25	6.1%	40
62	46.2%	26	47.9%	14
58	44.8%	27	27.1%	24
84	39.8%	28	22.4%	29
38pt	38.4%	29	32.8%	19
86	37.5%	30	23.2%	28
82	37.1%	31	29.2%	22
50	33.3%	32	12.1%	37
43	33.1%	33	30.5%	21
73	31.1%	34	14.0%	34
51	30.2%	35	12.6%	35
81	26.2%	36	23.7%	27
44	25.4%	37	25.1%	26
83	21.0%	38	8.8%	39

Assembly District	Badillo Vote	Rank by Badillo Vote	Non-white Population	Rank By non-white Population
80	20.6%	39	5.4%	41
49	17.8%	40	1.4%	45
39	17.6%	41	15.7%	33
41	17.3%	42	21.6%	30
46	16.0%	43	9.7%	38
45	15.2%	44	1.4%	45
47	14.8%	45	0.8%	47
42	13.6%	46	1.5%	44
48	12.3%	47	3.1%	42

Most deviations can readily be explained in racial or ideological terms. The 77th, 79th and 75th districts are heavily Puerto Rican and it was to be expected that a Puerto Rican candidate would do especially well there. The 53rd and 56th districts, with a Black rather than Puerto Rican population, are located in Brooklyn, the home Borough of the white candidate.

Given this pattern of racial voting, especially in local elections such as the Strelzin-Greenidge election, placing non-white in majority white districts dilutes the effectiveness of their votes and prevents those non-white voters from electing the candidates of their choice.

Blacks and Puerto Ricans in Majority White Districts

In an area such as New York where voting is heavily on racial lines, the franchise is worth relatively little to Blacks and Puerto Ricans in majority white districts. Since non-whites are highly concentrated in ghettos in each of the three counties, one would expect racially fair lines to place

most Blacks and Puerto Ricans in majority non-white districts. Certainly lines drawn in a color blind manner across the boundaries of the non-white ghettos would place a proportion of whites in majority non-white districts comparable to the proportion of non-whites in majority-white districts.

In fact, however, the districts were created to maximize the number of non-white votes dissipated harmlessly in majority white districts, while minimizing the number of white votes wasted in majority non-white districts.

Table C

County District	Non-whites in Majority White Districts	Whites in Majority Non-white Districts
<i>Kings</i>		
Congressional	54.9%	5.28%
Senate	55.97%	5.05%
Assembly	36.29%	11.04%
<i>New York</i>		
Congressional	43.58%	16.46%
Senate	50.54%	21.38%
Assembly	47.44%	8.47%
<i>Bronx</i>		
Congressional	47.53%	19.71%
Senate	50.19%	19.29%
Assembly	43.69%	20.34%

Several things about this table are particularly noteworthy. First, the disproportion in the degree to which white and non-white votes are diluted is greatest in Brooklyn, where we maintain racial gerrymandering is easiest and worst. Second, there is less dilution in Assembly Districts since they are smaller than Senate and Congressional Districts and thus less efficient for pairing Black and Puerto Rican neighborhoods with distant white areas. Third, the proportion of white voters in majority non-white districts in New York County Assembly Districts is less than half the proportion in any other districts in New York or Bronx Counties. Fourth, the apparently lower proportion of non-whites in majority white Assembly Districts in Kings County is the result of the 57th Assembly District, where the total population is 50.1% non-white. The proportion of the white population that is of voting age, however, is substantially higher than that of non-white population, so that in a district of equal white and non-white population, the voting population is about 55% white. See *Statistical Abstract of the United States*, 1968, p. 26. If the 57th Assembly District were treated as a majority white district, the proportion of non-whites in majority white assembly districts in Kings County would be 43.5% rather than 36.29%.

These differences are further reflected in the total number of non-whites in majority white districts, and the total number of whites in majority non-white districts. Treating districts less than 51% non-white as majority white, for the reasons stated above, the results are as follows.

Table C-1

County District	Non-whites in Majority White Districts	Whites in Majority Non-white Districts
<i>Kings</i>		
Congressional	455,862	93,547
Senate	574,811	44,081
Assembly	361,707	135,260
<i>New York</i>		
Congressional	233,227	165,082
Senate	268,436	213,980
Assembly	254,078	84,884
<i>Bronx</i>		
Congressional	256,367	183,869
Senate	264,589	182,223
Assembly	232,266	191,201

The number of non-whites in majority white districts exceeds the number of whites in majority non-white districts by between 3 and 5 to 1 in all districts in Kings County and in the Assembly Districts in New York County. The ratio is less than 1.5 to 1 in all the other districts.

The disproportionate number of non-whites in majority white districts is the result of racial gerrymandering. It has, and is intended to have, a discriminatory effect, particularly to preserve in office white incumbent legislators despite a rapidly growing non-white population. The gerrymandering is accomplished by pairing a smaller non-white community with a larger white community, yielding a safe

white district in which thousands of non-white votes have been safely dissipated.

The gerrymandering is worst in Kings County, where gerrymandering is easiest for geographical reasons. The non-white community in Kings County is largely concentrated in a single ghetto, which includes Bedford Stuyvesant in central Brooklyn, East New York to the east, Bushwick to the north, and Fort Greene to the West. The gerrymandering of the Congressional, Senate and Assembly Districts is accomplished in the same way. A single overwhelmingly non-white district (the 12th Congressional and 18th Senate), or in the case of the smaller Assembly Districts 5 districts (the 40th, 53rd, 54th, 55th and 56th), are placed in the center of the ghetto. Most of these districts are over 80% non-white. The non-white communities remaining further from the center of ghetto are then paired with larger white communities outside the ghetto. The non-white community of Bushwick is in the majority white 59th Assembly District (58.1% white), the majority white 17th Senate District (62.8% white), and the majority white 14th Congressional District (60.8% white). The non-white community of Fort Greene is in the majority white 57th Assembly District (55% white voting age population), the majority white 14th Congressional District and the 25th Senate District (about 45% of the voting age population is Black and Puerto Rican). The southern portion of Bedford-Stuyvesant is divided among three majority white Assembly Districts, the 44th (74.9% white), the 43rd (69.5% white) and the 41st (78.4% white, two majority white Senate Districts, the 23rd (66.2% white) and the 19th (81.3% white) and two majority white Congressional Districts, the 15th (86.0% white) and the 16th (75.2% white). The non-white communities of East New York and Brownsville are divided between a majority non-white Assembly District (the 40th, 35.2% white) and a majority white Assembly District (the 38th, 67.2% white in Brooklyn), but are en-

tirely within a majority white Senate District (the 16th, 52.9% white) and a majority white Congressional District (the 11th, 73.5% white.)

There are 245,940 Blacks and Puerto Ricans in the 6 majority white Assembly Districts which siphon off non-whites votes from the Bedford-Stuyvesant ghetto; the average Assembly District in New York has a population of 120,767. There are 523,216 Blacks and Puerto Ricans in the 5 majority white Senate Districts which siphon off non-white votes from the Bedford-Stuyvesant ghetto; the average Senate District in New York has a population of 304,000. There are 434,616 Blacks and Puerto Ricans in the 4 majority white Congressional Districts which siphon off non-white votes from the Bedford-Stuyvesant ghetto; the average Congressional District in New York has a population of 467,600. Not a single white community of any size is located in a majority non-white district in Kings County.

The racial gerrymandering in the other counties is severely limited by geography; the Black and Puerto Rican ghetto is concentrated at the northern end of an island in New York County, and at the southern end of a peninsula in Bronx County. In both counties a substantial discriminatory purpose and effect have been achieved by the Assembly District lines. In New York County substantial numbers of minority voters are included in the majority white 68th district (82.4% white) which siphons off 21,527 non-whites from the western portion of Harlem and the 71st District, which siphons off 53,818 non-whites, mostly Puerto Rican, from East Harlem. The non-whites siphoned off into these two districts would, if combined, constitute a majority of any single district. The non-white population in the Lower East Side ghetto in Manhattan is divided between two majority white Assembly Districts, the 62nd with 34,244 non-whites and 63rd with 48,191 non-whites. If the non-white population of these districts were combined in a single Assembly District, they would constitute a majority white

Assembly Districts reach into the South Bronx ghetto to pair off non-white communities with larger white areas. There are 38,387 non-whites in the 85th Assembly District (68.7% white), 27,473 in the 84th Assembly District (77.6% white), and 55,677 in the 76th Assembly District (54.6% white). The 84th district is most obviously gerrymandered, consisting of a predominantly non-white southern portion and a predominantly white northern portion, joined by an unpopulated mile long corridor known as the Major Deegan Expressway. The 123,537 non-whites siphoned off by these three Assembly Districts in Bronx County exceed in size the average Assembly District in New York.

Compactness

One ready index of the extent to which districts have been gerrymandered is their compactness. In the instant case we maintain that, to the extent possible, Black and Puerto Rican votes were diluted by placing one or more minority districts in the middle of the ghetto, and pairing the surrounding parts of the ghetto with larger white areas. If true this would generally be reflected by comparatively compact districts in the midst of the ghetto, and non-compact majority white districts including parts of the ghetto.

The compactness of a district can be computed in numerical terms by dividing the circumference squared by the area. This figure will be a constant for the same shape district, thus cancelling out any differences due to population density. The compactness ratio of any circle, for example, is 4π ; any square is 16, and any 30-60-90 degree triangle is 24.

The clearest story of gerrymandering is told by the compactness ratios of the Congressional districts in Brooklyn.

Table D

Compactness Ratios—Brooklyn Congressional Districts

District No.	Majority Race	Ratio
12	Non-white	38.8
13	White	63.7
14	White	78.6
15	White	48.6
16	White	77.8

These ratios reflect the compactness of the 12th Congressional district in the heart of Bedford Stuyvesant, and the elongated majority white districts surrounding the 12th and pairing the remaining residents of Bedford Stuyvesant with white voters substantial distances away.

A similar pattern exists among the Assembly Districts in, and bordering, Bedford Stuyvesant, and in the South Bronx.

Table E

Compactness Ratios
Central Brooklyn Assembly Districts

District No.	Majority Race	Ratio
54	Non-white	42.5
59	White	48.5
53	Non-white	62.2
55	Non-white	68.3
43	White	68.5
56	Non-white	72.0
57	Non-white	79.4
51	White	83.8
52	White	85.4
41	White	89.3
40	Non-white	94.8
44	White	112.9

Table F

Compactness Ratio

District No.	South Bronx Majority Race	Ratio
78	Non-white	25.8
77	Non-white	39.0
75	Non-white	48.4
76	White	68.4
84	White	71.2
85	White	75.5
81	White	87.5
79	Non-white	91.1

Similarly the Assembly District in central Harlem, the 79th, has a ratio of 38.1; the bordering majority-white districts which include substantial numbers of non-whites, the 68th and 71st, the ratios are 58.9 and 90.9.

These variances in compactness confirm the discriminatory purpose and effect of chapters 11, 76, 77 and 78.

Election Inspectors

The key election officials in the New York State are the election inspectors; there are approximately 20,000 of these part-time Board of Election employees in New York City alone. The inspectors are responsible for running the polling places on election day, where they exercise broad discretion in deciding who is eligible to vote and are the primary source of assistance, if any, for voters in need of help. The inspectors also man the polls several days a year during what is known as "local registration," when citizens can register to vote at the neighborhood location where they would normally vote. The overwhelming majority of persons registering to vote each year do so through the election inspectors at local registration.

Under New York law election inspectors are nominally chosen by the Board of Elections from lists furnished by the county chairmen of the two majority parties. Since both parties are represented, this is supposed to guarantee fairness. In fact, this is largely a charade designed to mask the actual system by which inspectors are chosen. The county chairman, in the first place, never submits as many names as there are vacancies, so the Board of Elections has no choice but to name every person on the chairman's list. So far as known, no person "nominated" by a party chairman has ever been denied appointment by the Board. Moreover, the selection of the inspectors is not actually made by the county chairman himself, but is delegated by him either to the neighborhood elected party official, the Assembly District leader, or to the officials of the predominant political club in the area. These clubs, in turn, are organized along the lines of the Senate, Assembly, or Congressional districts in the area, and are usually controlled by one of the incumbent elected officials.

The Board of Elections can only fire an inspector after notice and hearing; the county chairman, as a matter of state law, can fire any inspector on the spot at will. So far as is known, the Board has never fired an inspector. Inspectors are frequently fired by county chairman, when they fail to act as instructed at the polls, when they support the wrong candidates, or when the local political leaders who supported them are defeated.

Employment as an election inspector has traditionally been regarded as a minor patronage post, especially in lower income neighborhoods. It is given to political workers as a reward for long years of diligent labor for the candidates of the local dominant wing of the party. In return for this appointment inspectors are expected to work for and support particular candidates on election day, and to act on election day and during local registration in a manner which furthers the political interests of the officials or party

leaders who got them their jobs. There are virtually no Republican party primaries in New York City, and in a Democratic Primary the Republican inspectors have little or no interest in which Democrats may be denied the vote or refused assistance by Democratic inspectors.

All this is of critical importance to the district lines because the election inspectors are appointed and controlled by the dominant faction in the district—especially the Assembly District—involved, and which faction will be dominant depends on how those lines are drawn. Thus, if a Black community is put in a majority white district, the election inspectors in that community will be chosen and controlled by the white party and public officials elected by the white voters of the district. Because of this system, placing non-white voters in a majority district will have a discriminatory effect in one of three ways.

(1) Although the Board of Elections does not keep statistics on the race of inspectors, our interviews with Black and Puerto Rican political officials reveal that in many instances where non-white communities are a majority white districts the white politicians will appoint white election inspectors to run the polls in Black and Puerto Rican areas. Wholly aside from how these inspectors conduct themselves, Blacks and Puerto Ricans are bound to be deterred from seeking to register and vote when the polls in their neighborhoods are being run by whites. So far as is known, there are no white areas in which most or all of the election inspectors are black or Puerto Rican.

(2) In an election where Blacks and Puerto Ricans are known to support the candidate or candidates opposed by the election inspectors or the politicians who appointed them, discrimination against Black and Puerto Rican voters is common-place. Within the last several years two elections have been overturned in the three counties on this very ground. One, *Coalition For Education in School District One v. Board of Elections* (73 Civ. 3983, S.D.N.Y.), involved

a race between a white slate of candidates for election to a community school board, and an integrated Black, Puerto Rican and Chinese slate. The second, *Lowenstein v. Larkin*, 335 N.Y.S.2d 799 (1972), arose out of a race between two white candidates, an incumbent conservative supported by the election inspectors and an insurgent liberal supported by most of the Black and Puerto Rican voters.

(3) Where Black and Puerto Rican inspectors have been appointed as inspectors in non-white communities located in majority white districts, these inspectors have been summarily dismissed when a non-white insurgent ran against a white candidate supported by the white politicians in control of the district. In 1970, when the white incumbent in the 19th Senate District in Brooklyn, Jeremiah Bloom, was challenged by a Black candidate, Alan Fagan, Black inspectors were dismissed for this reason. In 1973, the leading white candidate for councilman at large in Brooklyn, Robert S. Steingut, was opposed by a Black candidate, Myrtle Whitmore. In the 41st Assembly District, which happened to be represented by Mr. Steingut's father, several Black inspectors, including Ms. Emma Parker, were fired for this reason.

This method of appointing, controlling, and dismissing election inspectors imparts a discriminatory effect to any district plan which places substantial numbers of Blacks and Puerto Ricans in majority white districts. A districting plan, unobjectionable of itself, may be discriminatory when combined with other election procedures. This was one of the reasons which prompted the Attorney General to disapprove the districting in *United States v. Georgia*, 41 U.S.L.W. 4570 (1973), where the effect of the proposed districting was aggravated by such devices as numbered posts and majority run-offs, and in *City of Petersburg v. United States*, 354 F.Supp. 1021 (D.D.C. 1972), aff'd —U.S.—, where the effect of a proposed annexation was rendered discriminatory by an at-large method of election. We main-

tain that Chapters 11, 76, 77 and 78 have a discriminatory effect in light of the election inspector system in New York, Bronx, and Kings Counties.

Racially Fair Districts

If the district lines had been drawn in a racially fair and neutral manner, the resulting districts would have been far more compact, and the number of non-whites in majority white districts substantially smaller and closer to the proportion of whites in majority black districts. Had the district lines been drawn without a discriminatory purpose or effect, they would have differed from the present lines in the following respects:

The Black and Puerto Rican ghetto in central Brooklyn, instead of being divided among 1 majority non-white district (12th) and four majority white districts (11th, 14th, 15th and 16th), would be divided into two majority non-white districts. The minority communities, now in majority white districts, which would be included in one of the majority non-white districts would include Bushwick, Fort Greene, East New York, and southern Bedford-Stuyvesant.

The 17th Senate District, instead of joining Black and Puerto Rican Bushwick with white Greenpoint, would join Bushwick with most of the Black and Puerto Rican district of Fort Greene, to form a majority non-white district. The 25th Senate District, most of which is located in Manhattan, would cross the river to include Greenpoint instead of crossing the river to include Fort Greene.

The Black and Puerto Rican communities in East New York, southern Bedford-Stuyvesant and eastern Bedford-Stuyvesant near Grand Army Plaza, instead of being divided among three majority white districts (16th, 19th and 23rd), would be consolidated with the majority non-white 18th district to yield two or three majority non-white districts.

The Black and Puerto Rican communities that constitute the northern third of the 41st, 43d and 44th Assembly Districts, instead of being divided among those three majority white districts, would be merged in a single majority non-white district.

The Black community in West Harlem, now in the majority white 71st Assembly District, and the Puerto Rican community in East Harlem, now in the majority white 68th Assembly District, would be merged with the population now in the majority non-white 70th, 72nd and 74th Assembly Districts to yield four majority non-white districts, one of them a majority Puerto Rican district including the substantial Puerto Rican population now divided among the 68th, 70th, and 72nd districts.

The Black and Puerto Rican population of the Lower East Side, now divided between the majority white 62nd and 63d Assembly Districts, would be consolidated into a single non-white majority district.

The Black and Puerto Rican communities in the 76th Assembly District, the eastern portion of the 85th Assembly District, and the southern portion of the 84th Assembly District, all three of which districts have white majorities, would be combined with the population of the majority non-white 78th and 79th districts to yield three majority non-white districts rather than two.

LEGAL DEFENSE FUND

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
10 Columbus Circle, New York, N.Y. 10019 • (212) 586-8397

March 21, 1974

Honorable J. Stanley Pottinger
Civil Rights Division
550 11th St., N.W.
Washington, D.C.

Dear Mr. Pottinger:

I would like to offer the following additional information, regarding Chapters 11, 76, 77 and 78, New York Laws of 1972, and in response to the Memorandum submitted by the Attorney General of New York in support of the district lines established by those provisions.

The Attorney General's Memorandum misconstrues the argument in our earlier Memorandum in several respects. First, we do not urge that the district lines must be redrawn to create the maximum number of majority non-white districts; rather, we contend only that the Voting Rights Act prohibits lines such as these which dilute large numbers of non-white votes. Second, our concern is not to spread the Black and Puerto Rican population in non-white districts among a larger number of non-white districts, but to consolidate the hundreds of thousands of non-white voters now divided among many majority white districts.

New York also suggests the 1972 lines should be approved because the proportion of non-white districts is comparable to the proportion of non-whites in the total population. Memorandum In Support, p. 9. This is among the relevant criteria, and was heavily relied on by the District Court in *Beer v. United States* in disapproving the New Orleans City Council lines under Section 5. Slip opinion, pp. 52 et seq. While this is an appropriate cri-

terion, the facts in this case do not warrant approval of the 1972 lines, but reveal instead gerrymandering as bad as was shown in *Beer*. The first useful comparison is between the proportion of the population that is non-white and the proportion of the districts with non-white majorities. In the instant case the proportion of the districts with non-white majorities is in every instance lower than the proportion of the population which is non-white.

Table I

	New York County	Bronx County	Kings County	New Orleans
Non-white Population	36.8%	45.7%	35.6%	34.5%
Percent of Congress- sional Districts with non-white majority	30.4% (1 of 3.29)	31.8% (1 of 3.15)	17.9% (1 of 5.57)	—
Percent of Senate Districts with non-white majority	30.4% (1.54 of 5.06)	40.4% (1.47 of 4.84)	11.7% (1 of 9.56)	—
Percent of Assembly District with non-white majority	(3 of 12.59) 23.8%	(4 of 12) 33.3%	(5 of 21.55) 23.2%	—
Percentage of City Council Districts with non-white majority	—	19.6% (1.32 of 6.72)	—	14.3% (1 of 7)

Of particular emphasis in *Beer* was the difference between the actual number of districts with non-white majorities, and the "theoretical" number which would have existed if the proportion of non-white districts was equal to the proportion of non-whites in the population. In this respect, as well, it is clear that the 1972 district lines have a discriminatory effect.

Table 2

District	Actual Non-white Districts	Theoretical Non-white Districts	Difference
<i>New York County</i>			
Congress	1	1.21	.21
Senate	1.54	1.86	.32
Assembly	3	4.63	1.63
<i>Bronx County</i>			
Congress	1	1.44	.44
Senate	1.47	2.21	.74
Assembly	4	5.50	1.50
City Council	1.32	3.07	1.75
<i>Kings County</i>			
Congress	1	2.02	1.02
Senate	1	3.05	2.05
Assembly	5	7.68	2.68
<i>New Orleans</i>			
City Council	1	2.42	1.42

It is apparent that, by the standards sanctioned in *Beer* at the urging of the Department of Justice, the 1972 District lines must be disapproved in the respects outlined in our previous memorandum.

Beer did not decide whether or not the purpose of the New Orleans City Council lines was discriminatory, but the standard for establishing such purpose urged by the Department of Justice was correct. The Government urged that the submitting authority could not meet its burden

of proof where the lines had the effect of minimizing non-white voting strength and were intended, in part to protect in office the incumbents. Slip opinion, pp. 47-48. The effect of the New York lines is apparent, and the Attorney General of New York candidly concedes that district lines which did not preserve in office the incumbent legislators—including white legislators with large numbers of non-whites in their districts—would have had little chance of passing the New York Legislature in 1972.

New York also urges that the Assembly lines in Bronx County should be approved because the Regular Democratic Organization in that County has agreed to support a non-white candidate in the 76th Assembly District. The value of this assurance is less than appears, however, for the white incumbent in the 76th Assembly District is not a member of the Regular faction of the Democratic party, but of the Reform faction, and has not in the past had Regular support. It appears to be the consensus of the politicians with whom we have consulted that a non-white candidate could not defeat Assemblyman Posner in the 76th Assembly District even with support of the Regular organization. Moreover, the election of non-white candidates dependent on the gratuitous support of such white organizations is no substitute for racially fair districts which assure equal weight to non-white votes. *Beer v. United States*, slip opinion pp. 21-22.

Yours sincerely,

/s/ ERIC SCHNAPPER
Eric Schnapper

ES:aa

cc: Gerald Jones
Richard Scanler
Michael Scadron
Herbert Teitelbaum
George Zuckerman

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74C-877

[Caption omitted]

Motion for Preliminary Injunction

Pursuant to Rule 65, Federal Rules of Civil Procedure, plaintiffs hereby move the Court for a preliminary injunction enjoining the defendants, their agents, servants, employees and all persons in active concert and participation with them from in any way enforcing Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, on the grounds that

(1) As appears from the complaint herein, and the evidence adduced on June 20, 1974, there is substantial likelihood that plaintiffs will prevail on the merits of this action;

(2) Unless restrained by this Court, defendants will enforce the 1974 State Senate, Assembly and Congressional district lines as set forth in said Chapters;

(3) Such action by the defendants will result in irreparable injury, loss and damage to the plaintiffs, and

(4) The issuance of a preliminary injunction will not cause serious loss to defendants, but will prevent irreparable injury to the plaintiffs.

NATHAN LEWIN

DENNIS RAPPS

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74 C 877

[Caption omitted]

Supplementary Exhibits of Applicants for Intervention

Applicants for intervention, the N.A.A.C.P., etc., et al., submit the following exhibits in support of their motion to dismiss the complaint for failure to state a claim on which relief can be granted. Each of the annexed documents was part of the record upon which Assistant Attorney General Pottinger based his decision of April 1, 1974.

1. Letter of Congresswoman Shirley Chisholm to J. Stanley Pottinger, March 14, 1974;
2. Letter of Congressman Herman Badillo to J. Stanley Pottinger, March 13, 1974;
3. Letters of Councilman Samuel D. Wright to J. Stanley Pottinger, March 11, 1974;
4. Letter of Councilman Luis Olmedo to J. Stanley Pottinger, February 22, 1974;
5. Population statistics for the 1972 Senate, Assembly and Congressional districts, estimate prepared by New York on January 25, 1974;
6. Population statistics for the 1972 Senate, Assembly and Congressional districts, estimate prepared by New York on February 19, 1974.

Respectfully submitted,

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

*Counsel for Applicants
for Intervention*

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

March 14, 1974

Honorable Stanley J. Pottinger
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C.

Dear Mr. Pottinger:

I am writing to urge that, pursuant to Section 5 of the Voting Rights Act, you interpose an objection to Chapters 11, 76, 77 and 78 of New York Laws of 1972, which alter the Assembly, Senate, and Congressional lines in New York, on the ground that these provisions have the purpose and effect of discriminating on the basis of race.

The worst problems under these provisions are in Kings County. For many years district lines have been gerrymandered in Kings County so that number of districts with Black and Puerto Rican majorities is kept to a minimum. Before 1968, for example, the more than half million minority residents of Bedford-Stuyvesant were divided among five different Congressional Districts with white majorities, so that it was impossible for minority voters in Brooklyn to be represented in Congress by a Black or Puerto Rican. Even this egregious situation was not altered voluntarily by the white politicians who control redistricting in New York, but was changed only as the result of federal litigation.

According to the 1970 Census, there were approximately 1,772,000 whites and 830,000 non-whites in Kings County. Although only 467,000 are needed for a Congressional District, there is only a single Congressional District with a majority of Black and Puerto Rican voters, the 12th. There are only 93,547 whites in the 12th Congressional

District, compared to 436,510 Blacks and Puerto Ricans in the white Congressional Districts. Although only 304,000 are needed for a Senate District, there is only a single Senate District with a majority of Black and Puerto Rican voters, the 18th. There are only 44,081 whites in the 18th Senate District, compared to 553,935 Blacks and Puerto Ricans in white Senate Districts. Similarly, there are 361,707 non-whites in the majority white Assembly Districts in Brooklyn, but only 135,260 whites in Black and Puerto Rican Districts. The purpose and effect of the 1972 district lines was to minimize minority voting strength by placing hundreds of thousands of minority voters in white districts where their votes, in local elections, are virtually worthless.

Yours sincerely,

/s/ SHIRLEY CHISHOLM
Shirley Chisholm
Member of Congress

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

March 13, 1974

Honorable Stanley J. Pottinger
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C.

Dear Mr. Pottinger:

In approximately two weeks the Department of Justice will make a determination as to whether the district lines for the U.S. Congress, the New York State Senate and Assembly and the New York City Councilmanic elections in New York, Bronx and Kings Counties discriminate against minority group persons.

I am aware that the Civil Rights Division has already received correspondence from political and civic leaders charging that these lines discriminate against Puerto Ricans and Blacks in the three counties and urging that they be rejected. I join in calling upon the Justice Department to fulfill its mandate under the Voting Rights Act and reject these lines.

Without repeating each instance in which the lines discriminate against Blacks and Puerto Ricans, I would like to call to your attention some examples in each county where minority groups are excluded for fair political representation. On the East Side of Manhattan, in the area commonly referred to as East Harlem, Puerto Ricans comprise the overwhelming majority. Nevertheless, they are divided into assembly districts in a manner making it virtually impossible for them to elect a Puerto Rican candidate to the Assembly.

A similar situation exists in the Williamsburg section of Brooklyn. There Puerto Ricans are in the vast majority yet are precluded from electing either a State Senator or Assemblyman because their community is carved up by the district lines.

Finally, in the Bronx, where the minority population approaches 50 per cent, there is only one minority City Councilman of the eight Councilmen representing the borough. This bizarre situation is attributable mainly to the way in which councilmanic district lines are drawn.

There are but three examples of a pervasive pattern of discrimination in the drawing of the district lines. I am confident that careful analysis by your staff will reveal many others.

In light of the foregoing I believe very strongly that the present political district lines in the counties of New York, the Bronx and Kings are racially gerrymandered and must be rejected. I am hopeful that you will give these comments your fullest and most careful consideration.

Sincerely,

/s/ HERMAN BADILLO
Herman Badillo
Member of Congress

HB:sjb

THE COUNCIL
OF
THE CITY OF NEW YORK
CITY HALL
NEW YORK, N.Y. 10007

SAMUEL D. WRIGHT
Councilman, 26th District, Brooklyn
216 Rockaway Avenue
Brooklyn, N. Y. 11233
385-5100

March 11, 1974

Honorable Stanley J. Pottinger
Civil Rights Division
Department of Justice
Washington, D.C.

Attention: Richard Feldin

Dear Mr. Pottinger:

I am writing as a Minority Legislator (Councilman 26th C. D.), as former Assemblyman and a party to N.A.A.C.P. lawsuit, to urge that the Attorney General interpose an objection to Chapters 11, 76, 77 and 78 of New York Laws of 1972, which changed the lines of Congressional, Senate and Assembly districts in Bronx, Kings and New York Counties.

As you are doubtlessly aware, the lines as presently constituted put most Blacks and Puerto Ricans in districts with substantial white majorities. The lines were deliberately drawn in this fashion to disenfranchise the minority community by fragmenting their majorities in different districts around the core, which means that in New York it is almost impossible for a Black or Puerto Rican candidate to be elected from such a majority white district. Lines such as these, which pair off Black and Puerto Rican communities with larger white areas, necessarily dilute the

value of minority votes and assure the defeat of minority candidates.

You should also be aware that the 1972 lines were not, Legislators, in any meaningful sense, drawn in Albany or by the Legislature; on the contrary, the lines were generally drawn in each county by the respective Republican and Democratic County Party Chairmen. The primary purpose of these Chairmen was to preserve in office the incumbent Legislators, despite the substantial increase in minority voters. The lines were drawn with this goal in mind, despite the objections of the Black and Puerto Rican political leaders in Albany, of which I was one. In fact, I was the Chairman of the Black and Puerto Rican New York State Legislative Caucus.

Our efforts to obtain racially fair district lines were made and lost before redistricting was printed to or voted on by the Legislature.

I would urge the Attorney General to object specifically to the large number of Blacks and Puerto Ricans gerrymandered into the following majority white districts:

1. In Brooklyn, the 11th, 15th and 16th Congressional Districts;
2. In Brooklyn, the 41st, 43rd, 44th and 51st Assembly Districts;
3. In Brooklyn, the 16th, 17th, 19th, 23rd and 25th Senatorial Districts.

In these areas, which are compact and contiguous to each other with a constituency of minority people, effective representation for the problems of this community is denied because of said gerrymandering.

In addition to denying a Second Congressional District, which could be easily accommodated by a fair reapportion-

ment, insult was compounded to injury by drawing a Senatorial District (the 25th S. D.) which starts in the lower East Side of Manhattan and crosses the East River, going right to the heart of Bedford-Stuyvesant in Brooklyn.

Such outrageous flouting of racial equity must not be allowed to stand. This is why the Civil Rights Act was enacted in the first place. We are calling upon your Department to right the wrongs inflicted upon us by dominate, unfair White majority.

Attached is a map which would be more reflective of a fair reapportionment for Kings County.

Yours most respectfully,

/s/ SAMUEL D. WRIGHT
Samuel D. Wright
Councilman, 26th District

sf
Enclosure

THE COUNCIL
OF
THE CITY OF NEW YORK
CITY HALL
NEW YORK, N.Y. 10007

SAMUEL D. WRIGHT
216 Rockaway Avenue
Brooklyn, N. Y. 11233
385-5100

March 11, 1974

Honorable Stanley J. Pottinger
Civil Rights Division
Department of Justice
Washington, D.C.

Attention: Richard Feldin

Re: *As Addendum to Communication This Date*

Dear Mr. Pottinger:

It is may hope that the following information will assist you in your efforts to bring the pending litigation to a successful conclusion:

a) the population of Central Brooklyn is 1,041,505. Of that population

550,537 are Black;
300,901 are Puerto Rican;
190,077 are White.

In political terms, this population can conceivably contain

- 1) Two Congressional Districts with a minimum of 468,000 persons per Congressional District;
- 2) Three Senatorial Districts with a minimum of 303,000 persons per Senatorial District;

- 3) Three Councilmanic Districts with a minimum of 239,000 persons per Councilmanic District;
- 4) Eight Assembly Districts with a minimum of 121,500 persons per Assembly District.

It is only with this compilation of the population in mind that fair and equitable division of the district lines for political representation for all of the people of our City can be achieved, because these areas are compact and contiguous with the constituency contained therein.

Most respectfully yours,

/s/ SAMUEL D. WRIGHT
Samuel D. Wright
Councilman, 26th District

sf

THE COUNCIL
OF
THE CITY OF NEW YORK
CITY HALL
NEW YORK, N.Y. 10007

LUIS A. OLMEDO
Councilman, 27th District, Brooklyn
314 Grand Street
Brooklyn, N. Y. 11211
963-3440
566-4397

February 22, 1974

Mr. J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Pottinger:

This is in reply to your letter of February 16, which requested my views and comments on recent reapportionments of New York State.

I would like to limit my comments to the Borough of Brooklyn, in which I have lived for twenty years, and in which I represent a district in the City Council.

In my opinion, the State Assembly, State Senate, and United States Congressional lines have been drawn to exclude Black and Puerto Rican representation. In no legislative body, whether on the city, state, or federal level, are the Borough's Black and Puerto Rican citizens represented by Black or Puerto Rican representatives proportionate to the population. The reasons for this underrepresentation are, of course, complex. They include lack of voter participation and lack of political structure at the community level. But it relates directly, in one way, to the current district lines as well.

Ethnic groups in New York City have strong ethnic identification with their political leaders. This is especially true for groups who are just entering the political process. New York's Puerto Ricans and Blacks are no exception to these rules. The involvement and participation of these groups therefore depend to some extent on their perceived ability to elect leaders of their own groups.

The recent political experience of my own district confirms this. The activity of the Williamsburg and Brunswick Puerto Rican communities during the June, 1973 primary elections, in which there were serious Puerto Rican candidates for the Mayoralty and the local Council seat, surpassed all previous levels for municipal elections.

With these considerations in mind, I therefore think that new district lines are in order for Brooklyn to meet the requirements of the 1970 Voting Rights Act. I think that the State Assembly and the State Senate lines should be redrawn to provide more Assembly and Senate seats for Puerto Ricans and Blacks.

The Congressional lines pose a somewhat more difficult problem. While the lines should be re-drawn to provide more Puerto Rican and Black representation, they must be redrawn in a way that will not exclude any major ethnic group in Brooklyn from a decent opportunity to elect a Congressman. I would therefore oppose any re-districting which did not provide the Puerto Rican communities of Brooklyn from at least a chance to elect federal representatives.

Thank you for your consideration, and I would welcome the chance to give any further information or views that may prove useful.

Sincerely,

/s/ LUIS A. OLMEDO
Luis A. Olmedo

POPULATION STATISTICS FOR EXISTING CONGRESSIONAL
DISTRICTS

Congressional District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>KINGS COUNTY</i>					
11 pt.	263,379	193,584	46,618	21,333	1,580
12	467,738	93,547	315,255	55,660	3,274
13	467,737	446,638	9,354	8,419	3,274
14	467,723	284,376	87,464	90,738	5,612
15	467,730	402,247	25,257	36,015	4,209
16	467,705	351,714	95,411	15,901	4,677
<i>NEW YORK COUNTY</i>					
17 pt.	172,284	111,985	11,198	22,225	26,876
18	467,533	407,688	17,766	31,792	9,818
19	467,656	165,082	228,216	68,278	6,547
20 pt.	431,760	318,207	66,059	36,699	10,794
<i>BRONX COUNTY</i>					
10 pt.	339,707	264,631	34,650	37,368	3,057
20 pt.	36,056	33,604	649	288	1,550
21	466,674	183,869	138,136	140,002	4,200
22	467,805	333,077	72,042	58,476	4,210
23 pt.	161,459	117,542	36,651	5,973	1,453

* Individual populations do not add up to the district total because of rounding-off of percentages.

POPULATION STATISTICS FOR EXISTING SENATE DISTRICTS

Senate District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>KINGS COUNTY</i>					
15 pt.	17,523	17,312	53	123	350
16	304,004	160,818	101,841	39,216	1,824
17	304,002	190,913	41,952	68,400	2,432
18	304,002	44,081	238,643	19,456	2,128
19	304,004	247,155	47,729	6,080	3,344
20	304,002	300,354	1,824	608	1,216
21	304,001	274,817	4,256	22,800	2,432
22	304,000	286,084	6,992	8,816	2,128
23	304,001	201,249	65,056	32,832	5,168
25 pt.	152,471	45,131	78,675	26,682	1,982
<i>NEW YORK COUNTY</i>					
24 pt.	8,558	3,398	804	385	3,971
25 pt.	151,530	86,069	14,243	33,488	17,729
26	304,001	292,753	3,952	2,736	4,560
27	304,001	255,057	18,544	20,672	9,728
28	304,001	141,056	132,848	24,016	6,080
29	304,001	165,681	109,744	24,016	4,864
30 pt.	163,141	72,924	44,863	42,580	2,936
<i>BRONX COUNTY</i>					
30 pt.	140,863	56,063	35,215	48,175	1,408
31	304,000	164,160	69,008	67,792	3,040
32	304,001	126,160	104,576	69,920	3,344
33	304,002	227,089	42,864	30,704	3,334
34	303,998	267,518	24,928	9,728	1,823
35 pt.	114,837	103,468	4,708	5,053	1,607

* Individual populations do not add up to the district total because of rounding-off of percentages.

POPULATION STATISTICS FOR EXISTING ASSEMBLY DISTRICTS

Assembly District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>KINGS COUNTY</i>					
38 pt.	65,884	44,274	12,584	8,565	461
39	120,767	101,806	14,251	3,985	603
40	120,769	42,752	57,124	20,048	845
41	120,767	94,681	22,945	2,053	1,086
42	120,767	118,955	966	362	463
43	120,767	83,933	31,037	3,381	2,294
44	120,768	90,455	21,979	6,521	1,811
45	120,769	119,078	845	120	603
46	120,769	109,054	6,280	4,710	603
47	120,767	119,801	242	242	483
48	120,768	117,024	362	2,415	966
49	120,769	119,078	845	362	603
50	120,768	106,155	1,207	12,318	1,207
51	120,767	105,550	3,140	10,748	1,328
52	120,768	88,039	12,077	18,961	1,690
53	120,768	19,081	95,165	4,831	1,690
54	120,769	31,521	69,925	18,719	603
55	120,768	24,998	76,084	18,840	724
56	120,769	16,908	93,475	9,662	603
57	120,768	60,263	33,964	24,757	2,053
58	120,768	22,039	6,159	25,482	966
59	120,768	70,166	21,859	27,777	966

NEW YORK COUNTY

62 pt.	71,490	37,246	4,504	8,650	21,018
63	122,312	74,121	12,965	29,844	5,381
64	122,312	107,145	5,381	7,338	2,446
65	122,312	114,850	2,446	2,201	2,690
66	122,312	119,377	1,100	366	1,345
67	122,312	101,886	9,051	8,317	3,057
68	122,312	100,785	9,173	10,274	2,079
69	122,312	88,676	18,224	11,986	3,302
70	122,312	30,578	64,947	24,829	1,834
71	122,312	68,494	35,593	15,555	3,669
72	122,312	34,981	64,581	21,405	1,345
73	122,311	105,187	7,339	7,950	1,834
74	122,312	19,325	95,770	6,360	856

POPULATION STATISTICS FOR EXISTING ASSEMBLY DISTRICTS
(continued)

Assembly District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>BRONX COUNTY</i>					
75	122,641	56,415	30,047	35,320	853
76	122,637	66,960	31,510	22,565	1,471
77	122,643	50,161	28,944	42,680	981
78	122,641	36,056	55,801	29,679	1,226
79	122,649	48,569	33,974	38,389	1,717
80	122,641	116,018	2,208	3,802	736
81	122,642	93,575	20,113	7,971	981
82	122,641	86,829	17,047	17,415	1,340
83	122,640	111,348	4,292	5,641	858
84	122,644	95,171	14,962	10,056	2,452
85	122,641	84,254	17,047	20,113	1,226
86	122,641	94,188	23,424	4,047	981

* Individual populations do not add up to the direct total because of rounding-off of percentages.

EXHIBIT 9-B

POPULATION STATISTICS FOR EXISTING ASSEMBLY DISTRICTS

Assembly District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>KINGS COUNTY</i>					
38 pt.	65,884	41,770	13,967	9,817	329
39	120,767	101,565	14,492	4,106	604
40	120,769	28,864	67,389	24,033	483
41	120,767	94,440	23,308	2,053	1,087
42	120,767	119,076	966	362	483
43	120,767	83,088	31,882	3,502	2,295
44	120,768	89,248	22,825	6,884	1,812
45	120,769	119,078	845	242	604
46	120,769	108,934	6,401	4,831	604
47	120,767	119,801	242	242	483
48	120,768	117,145	242	2,536	845
49	120,769	119,078	845	362	064
50	120,768	105,430	604	13,768	1,087
51	120,767	104,826	2,898	11,835	1,208
52	120,768	83,571	13,164	22,463	1,570
53	120,768	15,217	98,909	5,072	1,570
54	120,769	16,666	81,640	22,101	242
55	120,768	8,816	89,127	22,463	483
56	120,769	8,575	101,204	10,507	483
57	120,768	46,858	40,820	31,037	2,053
58	120,768	81,639	6,159	32,366	604
59	120,768	57,606	26,690	35,989	604

NEW YORK COUNTY

62 pt.	71,490	33,243	4,647	9,866	23,735
63	122,312	61,278	15,167	39,507	6,360
64	122,312	106,656	5,382	7,828	2,446
65	122,312	114,851	2,446	2,324	2,813
66	122,312	119,377	1,101	367	1,345
67	122,312	101,030	9,296	8,929	3,058
68	122,312	99,684	9,418	11,253	2,079
69	122,312	85,863	19,570	13,332	3,425
70	122,312	9,418	79,992	31,190	1,712
71	122,312	62,379	39,507	16,512	3,914
72	122,312	18,224	76,934	25,930	1,223
73	122,311	104,576	7,461	8,562	1,835
74	122,312	14,066	100,663	6,727	856

EXHIBIT 9-B

POPULATION STATISTICS FOR EXISTING ASSEMBLY DISTRICTS
(continued)

Assembly District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>BRONX COUNTY</i>					
75	122,641	33,113	39,736	49,670	245
76	122,637	56,413	37,282	27,593	1,349
77	122,643	16,066	41,085	65,369	123
78	122,641	11,160	71,622	39,000	858
79	122,649	18,888	46,067	55,805	1,349
80	122,641	116,018	2,085	3,925	613
81	122,642	92,227	21,094	8,585	858
82	122,641	82,415	18,764	20,358	1,104
83	122,640	111,725	4,292	5,887	858
84	122,644	93,455	15,821	11,038	2,453
85	122,641	78,490	19,255	24,038	981
86	122,641	93,575	24,038	4,170	858

* Calculations done according to formula outlined on pages 5 & 6 of our submission letter of January 30, 1974.

EXHIBIT 9-B

POPULATION STATISTICS FOR EXISTING SENATE DISTRICTS

Senate District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>KINGS COUNTY</i>					
15 pt.	17,523	17,313	35	123	35
16	304,004	142,578	114,914	45,297	1,216
17	304,002	199,425	37,088	65,968	1,216
18	304,004	27,664	253,843	20,672	1,824
19	304,004	246,243	48,337	6,080	3,344
20	304,002	300,354	1,824	912	1,216
21	304,001	274,513	3,344	24,320	2,128
22	304,000	286,064	6,992	8,816	2,128
23	304,001	191,217	70,832	36,784	4,864
25 pt.	152,471	24,700	93,770	32,324	1,677
<i>NEW YORK COUNTY</i>					
24 pt.	8,558	3,184	822	402	4,151
25 pt.	151,530	70,461	16,214	43,035	21,820
26	304,001	292,573	3,952	2,736	4,560
27	304,001	253,233	18,848	22,192	9,728
28	304,001	128,896	142,880	26,144	6,080
29	304,001	155,649	117,648	26,144	4,560
30 pt.	163,141	45,027	57,752	57,589	2,773
<i>BRONX COUNTY</i>					
30 pt.	140,863	17,044	49,725	73,390	704
31	304,000	129,808	84,512	87,552	2,128
32	304,001	79,648	131,024	90,592	2,736
33	304,002	221,009	45,904	34,048	3,040
34	303,998	267,214	25,232	10,032	1,824
35 pt.	114,837	103,353	4,708	5,283	1,493

* Calculations done according to formula outlined on pages 5 & 6 of our submission letter of January 30, 1974.

EXHIBIT 9-B

POPULATION STATISTICS FOR EXISTING CONGRESSIONAL DISTRICTS

Congressional District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>KINGS COUNTY</i>					
11 pt.	263,379	189,106	49,779	23,177	1,317
12	467,738	47,242	355,013	63,145	2,339
13	467,737	447,157	8,887	8,419	3,274
14	467,723	247,893	102,899	112,254	4,677
15	467,730	399,441	25,257	39,289	3,742
16	467,705	348,908	97,750	16,370	4,677
<i>NEW YORK COUNTY</i>					
17 pt.	172,284	104,749	11,543	25,498	30,322
18	467,533	405,819	17,766	34,597	9,818
19	467,656	118,785	263,290	79,969	6,080
20 pt.	431,760	310,435	69,945	40,154	10,794
<i>BRONX COUNTY</i>					
10 pt.	339,707	258,177	36,688	42,124	2,718
20 pt.	36,056	33,604	613	288	1,550
21	466,674	76,535	187,603	200,203	2,333
22	467,805	319,043	79,059	66,428	3,742
23 pt.	161,459	116,250	37,781	6,135	1,292

* Calculations done according to formula outlined on pages 5 & 6 of our submission letter of January 30, 1974.

ADDENDUM TO EXHIBIT 9B
POPULATION STATISTICS FOR EXISTING DISTRICTS

Assembly District	Total Pop.	White	Negro	Puerto Rican	Other Races
<i>PART KINGS, PART QUEENS</i>					
38	120,768	96,380	14,022	9,982	439
<i>PART NEW YORK, PART RICHMOND</i>					
62	122,311	76,811	9,540	11,130	24,829
Senate District					
<i>PART KINGS, PART QUEENS</i>					
15	304,005	300,053	1,216	1,520	1,216
<i>PART NEW YORK AND RICHMOND</i>					
24	304,001	277,249	15,504	4,256	6,992
<i>PART NEW YORK, PART KINGS</i>					
25	304,001	95,161	109,984	75,359	23,497
<i>PART NEW YORK, PART BRONX</i>					
30	304,004	62,071	107,477	130,979	3,477
<i>PART BRONX, PART WESTCHESTER</i>					
35	304,001	277,195	16,814	7,364	2,628
Congressional District					
<i>PART BRONX, PART QUEENS</i>					
10	468,887	363,588	57,098	44,449	3,622
<i>PART KINGS, PART QUEENS</i>					
11	467,693	349,084	83,082	33,188	2,339
<i>PART NEW YORK AND RICHMOND</i>					
17	467,727	360,150	50,515	27,128	29,467
<i>PART NEW YORK, PART BRONX</i>					
20	467,816	344,039	70,558	40,442	12,344
<i>PART BRONX, PART WESTCHESTER</i>					
23	467,972	400,388	56,478	7,974	3,131

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74-C-877

[Caption omitted]

Notice of Motion to Dismiss

PLEASE TAKE NOTICE that the defendant will bring the attached Motion to Dismiss based on the attached papers before the Honorable Judge Walter Bruchhausen at the United States Court for the Eastern District of New York, Court Room 3, 225 Cadman Plaza East, Brooklyn, New York, at 10:00 a.m., on July 5, 1974.

Dated this 25th day of June, 1974.

DAVID TRAGER

United States Attorney

RICHARD SELDIN

Attorney

Department of Justice

Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74-C-877

[Caption omitted]

Motion to Dismiss

Defendant, William B. Saxbe, Attorney General of the United States, pursuant to Rule 12b(1) F.R. Civ. Proc., respectfully moves the Court to dismiss this action with respect to him, and submits as grounds therefor:

1. This Court lacks jurisdiction to hear the complaint as alleged against defendant William B. Saxbe since the relief sought as against the Attorney General is grantable, if at all, only by the United States District Court for the District of Columbia.

2. The plaintiffs lack standing to maintain the suit insofar as it is alleged against the Attorney General of the United States.

In support of this motion, the Court is respectfully referred to the attached memorandum in behalf of defendant William B. Saxbe, Attorney General of the United States.

DAVID TRAGER
United States Attorney

GERALD W. JONES

RICHARD SELDIN
Attorneys
Department of Justice
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74-C-877

[Caption omitted]

Plaintiffs' Motion for Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs hereby move, by their undersigned counsel, for the entry of summary judgment in their favor, declaring that Chapters 588, 589, 590, 591 and 599 of the 1974 New York Laws are unconstitutional under the Fourteenth and Fifteenth Amendments and permanently enjoining their administration and implementation by the defendants and any other agent or agency of the State of New York or of the City of New York. This motion is based upon the complaint herein and the exhibits attached thereto, the sworn testimony presented at the hearing before the Court on June 20, 1974, the exhibits introduced in evidence at the hearing, and the Memorandum of Law submitted in support of this motion. The motion is made in addition to, and not in place of, the plaintiffs' Motion for Preliminary Injunction which was filed on June 20, 1974, for and in support of which testimony was presented on that date. As explained in the Memorandum of Law submitted today, the undisputed material facts which compel entry of judgment for plaintiffs on the merits emerge from the testimony given on June 20. It is appropriate, therefore, for this Court to enter final judgment for the plaintiffs at this time. At all events, should the Court be left with some question as the appropriateness of summary judgment and wish to proceed to a more extensive trial on the merits, the plaintiffs are entitled, at the very least, to the entry of a preliminary injunction granting interim relief to be effective for the 1974 primary and general election.

The plaintiffs submit that, for purposes of this motion, there is no genuine issue as to the following material facts:

(1) The individual plaintiffs are voting-age citizens of the Jewish faith and are members of the *Hasidic* Jewish community of Williamsburgh, located in the County of Kings.

(2) The organizational plaintiff is a community-wide organization representing smaller groups within the Jewish population of Williamsburgh. It has been active in educating and encouraging the *Hasidim* of Williamsburgh to register and vote in national and local elections.

(3) The *Hasidic* community of Williamsburgh is a unitary ethnic group of extremely devout Jews who have particular legislative interests on the national and local level which require effective communication with national and local legislators.

(4) The *Hasidic* community of Williamsburgh settled in the area where they now reside after the Second World War. Most of the founders of the community were refugees displaced from their homes in Europe by the war and removed to concentration camps.

(5) At no time since the establishment of the *Hasidic* community of Williamsburgh until May 1974 was the entire area inhabited by the *Hasidic* community of Williamsburgh assigned to more than a single State Senate and State Assembly District. The area was recognized in all previous apportionments as a unitary community that should be within the boundaries of one Congressional, State Senate and State Assembly District.

(6) Chapters 588, 589, 590, 591 and 599 of the 1974 New York Laws divide the *Hasidic* community of Williamsburgh between the 57th and 56th Assembly Districts and between the 25th and 23rd Senate Districts so that

approximately 20,000 *Hasidic* residents live in the 57th Assembly District and 25th Senate District, and approximately 15,000 *Hasidic* residents live in the 56th Assembly District and 23rd Senate District.

(7) The effect of the division of the *Hasidic* community by the 1974 reapportionment is to reduce its voting strength and thereby to abridge the right to vote of individuals who are members of the *Hasidic* community.

(8) The sole reason for dividing the *Hasidic* community was to achieve a nonwhite population of at least 65 percent in each of the 56th and 57th Assembly Districts and in the 23rd and 25th Senate Districts. If the New York Legislature did not believe it was required to achieve this specified percentage of nonwhite residents in each of the districts, it would not have severed the *Hasidic* community between two assembly and Senatorial districts.

(9) The decision of the Attorney General of the United States that required an increased percentage of nonwhite residents in the 56th Assembly District and in the 25th Senate District was not based on any finding or evidence of any past history of purposeful or deliberate racial gerrymandering to dilute or minimize the votes of minority races in the County of Kings. It was based exclusively on his conclusion that the 1972 reapportionment lines showed "high minority concentration" in certain districts, and that non-white residents could have been assigned to neighboring districts and thereby have maximized nonwhite voting strength.

(10) Under the 1972 reapportionment, the *Hasidic* community of Williamsburgh was in an Assembly District which, according to the 1970 census, was 61.5% nonwhite. Because the Attorney General concluded that this was an insufficiently high percentage of nonwhite residents to comprise a "substantial nonwhite majority," and because representatives of the New York Legislature were led to

believe that a 65% figure was the minimum that could satisfy the Department of Justice, a plan that would have kept the *Hasidic* community intact in the 57th Assembly District but would have achieved only a 63.4% nonwhite majority was rejected by the Legislature.

(11) The harmful effect of the division of the *Hasidic* community by the 1974 reapportionment lines on registration and voting efforts in that community is irreparable if no corrective action is taken before the primary and general elections. Because of the "persecution complex" of the individuals in that community and their tendency to self-imposed isolation, the implementation of Chapters 588, 589, 590, 591 and 599 for the 1974 primary and general election will probably destroy the efforts made over the last six years to absorb the citizens of the community into the democratic process.

On the basis of the above facts, summary judgment should be rendered for the plaintiffs and an injunctive and declaratory decree entered immediately.

/s/ NATHAN LEWIN

/s/ DENNIS RAPPS

Attorneys for Plaintiffs

TABLE 1

TOTAL AND VOTING AGE
POPULATION KINGS COUNTY 1970

	White	Black	Puerto Rican
Total Population	1,675,216	654,989	271,769
Population over 17	1,260,957	381,156	138,945
Percent of total population eligible to vote	75.3%	58.2%	51.1%

Source: United States Census, General Social and Economic Characteristics, New York, pp. 615, 644, 661. White statistics are obtained by subtracting sum for Blacks and Puerto Ricans from statistics for the total population.

TABLE 2

KINGS COUNTY
POPULATION IN 1970 WITH
DIFFERENT RESIDENCE IN 1965

	<u>Non-White Population</u>	<u>White Population</u>
Population over 5	1,567,739	808,525
Prior residence in different county	87,113 (5.6%)	58,026 (7.6%)
Prior residence in different state	23,381 (1.5%)	17,542 (2.7%)
Prior residence aboard	54,158 (3.6%)	55,947 (6.9%)
Prior residence unknown	75,303 (4.8%)	61,443 (7.6%)

Source: United States Census, General Social and Economic Characteristics, New York, pp. 609, 644, 661. Non-white statistics are totals for Black and Puerto Rican population. White statistics are totals for the entire population minus the non-white totals.

TABLE 3

NON-WHITE POPULATION
OF 1972 KINGS COUNTY DISTRICTS
JANUARY AND FEBRUARY FORMULA

<u>District</u>	<u>January Formula</u>	<u>February Formula</u>
<i>Congress</i>		
11 (part)	69,795 (26.5%)	74,273 (28.2%)
12	374,189 (80.0%)	420,497 (89.9%)
13	21,047 (4.5%)	20,580 (4.4%)
14	183,814 (39.3%)	219,820 (47.0%)
15	65,481 (14.0%)	68,288 (14.6%)
16	115,989 (24.8%)	118,797 (25.4%)
<i>Senate</i>		
15 (part)	476 (2.8%)	193 (1.1%)
16	142,881 (47.0%)	161,427 (53.1%)
17	112,784 (37.1%)	104,272 (34.3%)
18	279,227 (91.9%)	276,339 (90.9%)
19	57,153 (18.8%)	57,761 (19.0%)
20	3,648 (1.2%)	3,952 (1.3%)
21	29,488 (9.7%)	29,792 (9.8%)
22	17,936 (5.9%)	17,936 (5.9%)
23	102,956 (33.9%)	112,480 (37.0%)
25 (part)	107,339 (70.4%)	127,771 (83.8%)

TABLE 3 (continued)

<u>District</u>	<u>January Formula</u>	<u>February Formula</u>
<i>Assembly</i>		
38 (part)	21,610 (32.8%)	15,283 (23.2%)
39	18,839 (15.6%)	19,202 (15.9%)
40	78,017 (64.6%)	91,905 (76.1%)
41	26,084 (21.6%)	26,448 (21.9%)
42	1,811 (1.5%)	1,811 (1.5%)
43	36,712 (30.4%)	37,679 (31.2%)
44	30,311 (25.1%)	31,521 (26.1%)
45	1,568 (1.3%)	1,691 (1.4%)
46	11,593 (9.6%)	11,839 (9.8%)
47	967 (0.8%)	967 (0.8%)
48	3,743 (3.1%)	3,673 (3.0%)
49	1,180 (1.5%)	1,811 (1.5%)
50	14,732 (12.2%)	15,459 (12.8%)
51	15,216 (12.6%)	15,941 (13.2%)
52	32,728 (27.1%)	37,197 (30.8%)
53	101,686 (84.2%)	105,551 (87.4%)
54	89,247 (73.9%)	103,983 (86.1%)
55	95,648 (79.2%)	112,073 (92.8%)
56	103,740 (85.9%)	117,194 (92.9%)
57	60,774 (50.3%)	73,910 (61.2%)
58	32,607 (27.0%)	39,029 (32.3%)
59	50,602 (41.9%)	63,283 (52.4%)

Explanation—The “January Formula,” was used to calculate the statistics regarding racial composition of districts in the tables prepared by New York for submission to Assistant Attorney General Pottinger, and dated January 25, 1974. The total population of each district was computed by adding the population of each block using the computer tape known as the “Third Count” tape. Since ethnic data by block was not available, the percentage of the district of each race was estimated based on census tract data, a census tract encompassing several blocks. This data was on “Fourth Count” computer tape. These percentages were multiplied times the total population of each district to yield the actual population of each race.

In the “January Formula” the census tract data employed was based on a computer program pursuant to which, if a Puerto Rican stated that his “race” was white or Black but his ancestry Puerto Rican, he was counted twice, as both a white or Black and a Puerto Rican. Such an error would tend to inflate the proportion of the population which was Black white; this in turn reduced the apparent Puerto Rican proportion. When that reduced proportion was multiplied times the population of a district to yield the Puerto Rican population, the error resulted in an inaccurately low number of Puerto Ricans. This error could tend to raise or lower the apparent *total* of non-white population of a district.

The “February Formula” was an attempt to correct this error. Unfortunately the number of Puerto Ricans in Kings County who had identified themselves as “white” or “Black” was not known. This Formula was based on a guess, in the light of national figures, as to how many Puerto Ricans had been double counted. The guess used assumed that virtually all Puerto Ricans had been identified as white and thus double counted. This guess was used to calculate the figures on the tables prepared by

New York for submission to Assistant Attorney General Pottinger, and dated February 1974.

As to the actual non-white population as of the 1970 census, all that can be said with certainty is that it lies somewhere between the January and February figures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74-C-877

[Caption omitted]

Affidavit

MARIAN B. SCHEUER, being duly sworn, deposes and says as follows:

1. I am a law student working for the N.A.A.C.P. Legal Defense and Educational Fund of New York, New York.

2. On June 27, 1974, I examined the records of the New York City Board of Education at 345 Adams Street, Brooklyn, New York.

3. According to plaintiffs' complaint the Hassidic Community of Williamsburgh is located in census tracts 509, 525, 529, 531, 533, 537, 539, 545, 547 and 549. The area is encompassed in election districts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13 of the 57th Assembly District, as that district existed under the 1972 lines.

4. According to the records of the Board of Elections, there were approximately 8,047 persons registered to vote in these twelve election district in 1972. A total of 7,644 persons actually voted in the November 1972 presidential elections in these districts, a turn out rate of 95.0%.

5. According to the records of the Board of Elections, there were approximately 3,565,147 persons registered to vote in the City of New York in 1972. A total of 2,600,507 persons voted in the November, 1972, presidential elections in New York City, a turnout rate of 73.0%.

6. According to the records of the Board of Elections, there were approximately 8,223 persons registered to vote in the twelve Hassidic election districts in 1973. A total of 5,161 persons actually voted in the November, 1973, mayoral elections in these districts, a turn out rate of 62.8%.

7. According to the records of the Board of Elections, there were approximately 3,161,666 persons registered to vote in the City of New York in 1973. A total of 1,771,316 persons voted in the November, 1973, mayoral elections in New York City, a turn out rate of 55.0%.

8. According to the records of the Board of Elections, a total of only 68 persons registered to vote in the twelve Hassidic election districts in the period from December 7, 1973 to June 22, 1974. Of these, 39 had been previously registered in another county in New York City or had only become old enough to vote after October of 1973.

/s/ MARIAN B. SCHEUER
Marian B. Scheuer

Sworn to before me this
27th day of June, 1974

/s/ ERIC SCHNAPPER
Notary Public

Eric Schnapper
Notary Public, State of New York
No. 31-9822985
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 74C-877

[Caption omitted]

Affidavit

COUNTY OF NEW YORK
STATE OF NEW YORK ss.:

ERIC SCHNAPPER, being duly sworn, deposes and says:

1. I am an attorney employed by the N.A.A.C.P. Legal Defense and Educational Fund, Inc.
2. On June 27, I drafted the proposal for changing the 1974 New York Assembly District lines. The changes affect only Assembly Districts 56 and 57 of Kings County in New York City.
3. I used the publication *1970 Census of Population and Housing—Census Tracts, New York, New York*, published by the United States Department of Commerce, PHC(1)-145, to determine the population of the pertinent census tracts.
4. The figures listed on the Assembly proposals, which are attached hereto and made a part hereof, are taken directly from the publication referred to in paragraph 3. The Total population, White and Negro figures are taken directly from that publication. I arrived at "Other non-white" by subtracting the figures for "White" and "Negro" from "Total population." The percentages are my own calculations. The "Total Addition" figures which appear at the end of each Annexation proposal were calculated by adding the figures for the census tracts involved in that annexation. The "Net Redistribution" figures which appear at the end of the Assembly redistricting are the result of combining the "Total Addition" figures.

5. Where the census tract number (for example "525" in the Assembly District proposal) appears without qualification, the annexation will include that tract in its entirety. Where the tract number appears with qualification (for example "555 (30%)" in the Assembly District proposal), I drew the lines through a particular census tract. The percentage qualifications represent my best estimate of the portion of that tract which would be included by the annexation.

6. On the Assembly proposal, 30% of tract 555 has been used because approximately 70% of the tract was in District 58.

7. 75% of tract 549 was used because approximately 50% of tract 549 is in District 58.

8. 95% of tract 537 was used because approximately 5% of tract 537 was in District 56.

9. 15% of tract 237 was used because approximately 85% of tract 237 was already in District 56.

10. 50% of tract 551 was used because approximately 50% of tract 551 is already in District 58.

11. 35% of tract 235 was used because approximately 65% of tract 235 was already in District 56.

12. 70% of tract 233 was used because approximately 30% of tract 233 was already in District 56.

13. 516 of tract 243 was used because only 5 of the 6 blocks in tract 243 are moved to District 56.

14. The red lines drawn on the 1974 Assembly maps attached hereto and made a part hereof represent the proposed annexations. The blue lines represent the 1974 lines which would be superceded by the proposed annexations.

15. The red lines are described in street name in each annexation proposal.

16. The census tracts which would be added to each district by ignoring the blue lines and following the red lines, are noted in each annexation proposal. The population figures or percentage approximations of population are also noted.

17. The census tracts which I have used were determined by comparing the map of census tracts printed in the publication referred to in paragraph 3 with the 1974 Senate and Assembly District maps. A copy of the pertinent section of the census map is attached hereto and made a part hereof. The red lines on the census map show my best estimation of the proposed changes. The blue lines show my best estimation of the pertinent sections of the 1974 lines.

/s/ ERIC SCHNAPPER
Eric Schnapper

Subscribed to and sworn before
me this 28th day of June, 1974

/s/ PEGGY C. DAVIS
Notary Public

Peggy C. Davis
Notary Public, State of New York
No. 31-5940055
Qualified in New York County
Commission Expires March 30, 1976

Assembly Districts

Annex to 56:

All portions of the 57th Assembly District now located north of Flushing Avenue and north or east of the Brooklyn Navy Yard.

Added Census Tracts

<i>Tract 555 (30%)</i>	No.	Percentage
Total Population	225	100.0
Black	9	4.0
Other non-white	22	9.9
White	194	86.1
<i>Tract 551 (50%)</i>		
Total Population	2882	100.0
Black	199	6.9
Other non-white	121	
White	2612	
<i>Tract 549 (75%)</i>		
Total Population	1163	100.0
Black	75	6.4
Other non-white	96	8.2
White	992	85.6
<i>Tract 525</i>		
Total populations	3864	100.0
Black	344	8.9
Other non-white	62	1.6
White	3458	89.5

<i>Tract 547</i>	No.	Percentage
Total Population	4290	100.0
Black	458	10.7
Other non-white	40	0.9
White	3792	88.4
<i>Tract 545</i>		
Total Population	3510	100.0
Black	292	8.3
Other non-white	48	1.4
White	3170	90.3
<i>Tract 535</i>		
Total Population	4473	100.0
Black	135	3.0
Other non-white	51	1.1
White	4287	95.9
<i>Tract 539</i>		
Total Population	1622	100.0
Black	209	12.9
Other non-white	22	1.4
White	1391	85.7
<i>Tract 537 (95%)</i>		
Total Population	2137	100.0
Black	426	19.9
Other non-white	41	1.9
White	1670	78.2

<i>Total addition to District 56</i>	No.	Percentage
Total Population	24,166	100.0
Black	2,097	8.7
Other non-white	503	2.1
White	21,566	89.2

Annex to 57:

These are bounded by the present border between 57th and 56th districts and a line from the East River along the eastern boundary of the Navy Yard to Flushing Avenue, east on Flushing Avenue to Bedford Avenue, south on Bedford to Van Buren Street, east on Van Buren to Nostrand Avenue, south on Nostrand to Fulton Street, west on Fulton Street to Putnam.

Added Census Tracts

<i>Tract 237 (15%)</i>	No.	Percentage
Total population	376	100.0
Black	102	27.2
Other non-white	12	3.1
White	262	69.7
<i>Tract 235 (35%)</i>		
Total Population	1069	100.0
Black	239	39.4
Other non-white	220	20.6
White	610	40.0

<i>Tract 233 (70%)</i>	No.	Percentage
Total population	3870	160.0
Black	2661	68.7
Other non-white	67	1.7
White	1142	29.6

Tract 229

Total population	4710	100.0
Black	4298	91.3
Other non-white	44	0.9
White	368	7.8

Tract 227

Total population	4684	100.0
Black	4553	97.2
Other non-white	30	2.2

Tract 243 (516—83.33%)

Total population	3910	100.0
Black	3668	93.1
Other non-white	103	2.6
White	169	4.3

Tract 245

Total population	5530	100.0
Black	5195	93.9
Other non-white	41	.7
White	294	5.4

<i>Total addition to District 57</i>	No.	Percentage
Total population	24,179	100.0
Black	20,716	85.7
Other non-white	517	2.1
White	2,946	12.8

Net Change to 57th District

Total Population	+13
Black	+18,619
Other non-white	+14
White	—18,620

Ethnic Composition of Assembly Districts

	<u>1972 Lines</u>	<u>1974 Lines</u>	<u>Plaintiffs' Plan</u>	<u>Intervenors' Plan</u>
<i>56th District</i>				
White	7.1%	11.9%	7.5%	27.3%
Non-white	92.9%	88.1%	92.5%	72.7%
<i>57th District</i>				
White	38.7%	35.0%	39.4%	19.6%
Non-white	41.3%	65.0%	60.6%	80.4%



BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74 C 877

[Caption omitted]

**Statement of Material Issues as to Which There Is
a Genuine Dispute**

Applicants for Intervention maintain, as does the United States, that plaintiffs have failed to state a claim for which relief can be granted, even assuming to be true all the facts alleged in the Complaint. Applicants further maintain that, regarding the facts which plaintiffs claim give rise to this action, there is a genuine dispute as to the following questions.

1. Whether the Hassidic community of Williamsburgh is "a unitary ethnic group" or has been recognized by the legislature as "a unitary community" in any legally relevant sense. Applicants for intervention maintain this is not the case. See Plaintiffs' Motion for Summary Judgment, ¶¶ 4-5.

2. Whether approximately 155,000 Hassidic residents live in the 56th Assembly District and 23rd Senate District. Plaintiffs' Motion for Summary Judgment, ¶ 6. Plaintiffs' own statistics indicate there are no more than 5,000 Hassidim in the 56th Assembly District and no more than 12,000 in the 23rd Senate District. See affidavit of James Rocap, III.

3. Whether the effect of dividing the Hassidic community would be to reduce its voting strength or abridge the right to vote of individual members of the community. Plaintiffs' Motion for Summary Judgment, ¶ 7.

4. Whether the "sole reason" for dividing the Hassidic community was to achieve a non-white population of at

least 65% in certain districts. Plaintiffs' Motion for Summary Judgment, ¶ 8. Mr. Scolaro testified that 65% standard could have been met without dividing the community. Transcript, pp. 172-175.

5. Whether the decision of the Attorney General of the United States was based in part on evidence of purpose or deliberate racial gerrymandering to dilute or minimize the votes of minority races in Kings County. Plaintiffs' Motion for Summary Judgment, ¶ 9. There was substantial such evidence in the record on which the Attorney General relied. See letters of Congresswoman Shirley Chisholm, Congressman Herman Badillo, Councilman Samuel Wright, Memorandum In Opposition to Approval of Chapters 11, 76, 77 and 78, New York Laws of 1972.

6. Whether the Attorney General's decision was based exclusively on "high minority concentration" or the possibility of maximizing" non-white voting strength. Plaintiffs' Motion for Summary Judgment, ¶ 9. That decision was based on a finding that the 1972 had the effect of denying or abridging the right to vote on account of race or color, in violation of Section 5 of the Voting Rights Act. Letter of J. Stanley Pottinger, April 1, 1974.

7. Whether under the 1972 reapportionment the 57th Assembly district was 61.5% non-white. Plaintiffs' Motion for Summary Judgment, ¶ 10. The *total* population of the district was between 50.3 and 61.2% non-white, the exact figure being impossible to determine. See Table 3. The population of *voting age* was no more than 40% non-white. See Table 1. See also Table 2.

8. Whether there will be any adverse effect of the 1974 lines on voter registration and voting efforts in the Hassidic community. Plaintiffs' Motion for Summary, ¶ 11. In six months to the enactment of the 1974 lines only 68 persons registered to vote in the entire Hassidic community, an area of over 30,000. Of these 68 a majority

were persons who had recently moved into the area or turned 18. Affidavit of Marian B. Scheuer.

9. Whether there is any unusual alienation or unwillingness to participate in the electoral process in the Hassidic community, or whether such would result from the 1974 district lines. Plaintiffs' Motion for Summary Judgment ¶ 11. The turnout rate in the Hassidic community in the last two general elections was substantially greater than that of New York City as a whole. Affidavit of Marian B. Scheuer. Alienation and unwillingness to participate in the electoral process are common and growing phenomenon, and are substantially greater among non-whites than among whites. See Louis Harris, "Alienation Index Rising."

Respectfully submitted,

/s/ JACK GREENBERG
Jack Greenberg
Eric Schnapper
Suite 2030
10 Columbus Circle
New York, New York 10019
212-586-8397

*Counsel for Applicants for
Intervention*

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20520

July 2, 1974

Honorable Walter Bruchhausen
United States District Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United Jewish Organization of Williamsburgh,
Inc. v. Wilson, No. 74C-877*

Dear Judge Bruchhausen:

This is in reference to the letter of plaintiffs' counsel dated June 28, 1974, accompanying his response to the motion to dismiss filed by the Attorney General of the United States noticed for argument for July 5, 1974, in which he requested that a decision be made on the motion without oral argument and before July 5.

In view of the large volume of materials already submitted to the Court including our motion to dismiss, plaintiff's response to our motion, and the NAACP's memorandum in support of motions to dismiss we agree that oral argument will not be necessary and that all papers be considered as submitted.

We are enclosing for the information of the Court a copy of our response of July 1, 1974 to the submission by the State of New York, under Section 5, of the reapportionments of certain Congressional, Assembly and Senate Districts in Kings and New York Counties, New York.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

July 1, 1974

Mr. Goerge D. Zuckerman
Assistant Attorney General
In Charge of Civil Rights Bureau
State of New York
Two World Trade Center
New York, New York 10047

Dear Mr. Zuckerman:

This is in reference to your submission to the Attorney General under Section 5 of the Voting Rights Act on behalf of Kings and New York Counties of Chapters 588, 589, 590 and 591 of the Laws of 1974 which revise some of the assembly, senatorial and congressional districts. This submission was made on May 31, 1974 and, in accordance with your request, expedited consideration has been given to this submission pursuant to the procedural guidelines for the administration of Section 5 (28 C.F.R. 51.22).

The Attorney General does not interpose any objection to the implementation of these acts. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin enforcement of such provisions.

Because the large volume of public comments we have received concerning this submission precludes an individual response to each person who has expressed a view concerning this legislation, we are making public our staff analysis of the major issues raised, a copy of which is enclosed for your information.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Nos. V6541 Thru 47

IN THE MATTER OF Chapters 588, 589, 590 and 591 of the
Laws of 1974 Amending New York State Law in
Relation to Certain Congressional, Assembly and
Senate Districts in Kings and New York Counties,
New York.

MEMORANDUM OF DECISION

July 1, 1974

Background

The instant submission was received on May 31, 1974 accompanied by a request for expedited consideration in anticipation of the beginning of the state's pre-election calendar on June 17, 1974. On the date of receipt, notice of submission and notice of the request for expedited consideration were mailed to persons listed in the Registry of Interested Persons as required in Civil Rights Division procedural guidelines.

This submission addresses the objection filed on behalf of the Attorney General on April 1, 1972. In that determination the Attorney General was unable to conclude that specified portions of the redistricting plan in the covered jurisdictions of Kings and New York County did not have a discriminatory effect on the voting rights of Black and Puerto Rican residents. At the request of members of the staff of the Joint Legislative Committee on Reapportionment attorneys of this office met with them to discuss the Attorney General's objection to the end that the state legislature could have a better understanding of methods of eliminating the dilutive effect of the prior plan. The Joint Committee staff was advised that in any such matter as

districting there were a number of alternatives, that it was the State's responsibility to design the districts, and that this Department had no interest in any particular plan.

The present revisions were adopted at a special legislative session on May 29, 1974. For the most part the legislature accepted the Joint Committee's recommendations.

Public comments on the revised district lines have been intense and voluminous. With respect to one senatorial district alone we have received petitions signed by 7,000 citizens. We have also received comments from representatives of racial and ethnic minority groups, neighborhood organizations, political candidates, members of the legislature, church groups and service clubs. The revisions have also been the subject of a number of news stories and editorial comments in news media serving the affected areas. Our staff has read and evaluated each such comment.

The comments fall into several general classifications. An examination of each indicates that there is no reasonable basis for entering a further objection under the Voting Rights Act and we recommend that no objection by the Attorney General be interposed to implementation of this plan. In this connection, it is important to note that we do not have standing to evaluate, and express no opinion as to, legal issues not within the scope of the Voting Rights Act. Complaints about the state's reapportionment plan which do not relate to an alleged purpose or effect of discrimination on the basis of race or color are not cognizable in the Justice Department's review, regardless of the merit or lack of merit such complaints may have.

Because there has been an unprecedented public interest in and comment on this submission, the following analysis sets forth our views on each of the major issues presented. Because the large number of persons commenting preclude a personal reply to each, we further recommend that this

memoranda be released to the public and the press so that the basis for our action can be known generally.

Analysis of Issues

1. *Scope of Attorney General's Authority to Review Matters Submitted Under Section 5, Voting Rights Act.*

Section 5 of the Voting Rights Act provides that:

Whenever a State or political subdivision [covered by the Act] shall act or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1974, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, . . .

That a legislative reapportionment such as the one involved here constitutes a change within the purview of Section 5 was made clear by the Supreme Court in *Georgia v. United States*, 411 U.S. 526 (1973).

Guidelines promulgated by the Attorney General for the processing of submissions made to him under Section 5 (28 C.F.R. 51, *et seq.*) provide, at Section 51.19, that:

Section 5, in providing for submission to the Attorney General as an alternative seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

Thus, pursuant to the guidelines, the Attorney General must use the same test in reaching his determination as would the District Court for the District of Columbia, *i.e.*, whether the submitted change has the purpose or effect of denying or abridging the right to vote *on account of race or color*. These guidelines have been upheld by the Supreme Court as a reasonable interpretation by the Attorney General of his responsibilities under the Act. *Georgia v. United States*, 411 U.S. at 536-41.

With this view of the Attorney General's Section 5 responsibility in mind, we turn to an examination of the issues raised by this submission.

2. Failure to Hold Public Hearings

Many of the communications received by the Department of Justice complain of the absence of public hearings by the state in connection with its enactment of the revised plans under submission. A number of these communications suggest that the state's proceedings were carried on in secrecy in order to pursue an unfair political advantage.

From all that we can perceive, however, the matter of redistricting in the affected districts has received wide publicity in the New York news media since the time the Attorney General's objection was interposed on April 1, 1974. For example, on April 7, 1974, a four-column editorial captioned *Albany Prepares for Redistricting to End Racial Inequities Here* appeared in the *New York Times* newspaper. Among other statements in the editorial was one in the second paragraph declaring that "The redistricting, pending further litigation, is tentatively being set for special legislative session late next month." In other news articles appearing as early as April 2, 1974, the nature of the Attorney General's objection was discussed, including speculation that new districts would have to be devised by the legislature and approved by the Department of Justice by June 17, 1974, the date for commencing the circulation of qualifying petitions. (See, e.g., *New York Times*, April 2, and April 9, 1974). Thus, it seems clear that the impending revision of the district lines objected to by the Attorney General was widely publicized.

The absence of formal public hearings is conceded by the state and in some circumstances could properly be considered in our review. In justification for its failure to provide such hearings the state offered the following:

Due to the extremely short period available to the Committee for completing its work and the countless hours required in effecting compliance with the New York State Constitutional block on the border rule, the

Committee was unable to hold Public Hearings. However, participation by any legislator, individual, public or special interest group was most welcome. The Committee has received either directly or through the [state] Attorney General's office numerous suggested districting plans. While many of these were merely suggestions respecting specific Assembly, Senate or Congressional Districts, the Committee staff plotted every suggestion received. This information was of substantial assistance to the Committee, particularly with respect to policy determination.

(Interim Report of The Joint Committee on Reapportionment, May 27, 1974, pp. 11-12.) The report went on to describe and discuss various suggestions and alternatives which were received from minority groups or individuals and considered by the Committee in arriving at the plans adopted. (*Id.* at pp. 12-13.)

Moreover, the staff of the Joint Committee developed almost all of the plan under submission. During our contacts with them, that staff viewed as its sole assignment the correction of the conditions addressed in the Attorney General's objection and in the view of the Justice Department Staff expressed only professional considerations.

It appears, therefore, that even though no formal public hearings were held by the state, there was substantial public awareness of the issues being considered and that, in fact, there was significant contribution by interested parties. While full public hearings in a matter of this nature would in our opinion ordinarily be preferable, under the circumstances involved here we are unable to conclude that the state had no rational justification for dispensing with those hearings. In any event, we find nothing in the notice procedures used by the state which would warrant an objection by the Attorney General absent some other more substantive infirmity.

3. *Applicability of the Voting Rights Act Provisions Involved*

The Voting Rights Act of 1965 was enacted primarily to enforce the Fifteenth Amendment to the Constitution of the United States and, thus, primarily to assure and protect the voting rights of black Americans. (Hearings on Voting Rights Bill H.R. 6400 before the House Committee on the Judiciary, 89th Cong., 1st Sess., at 9 (1965).) The special applicability of Section 5 preclearance requirements was specifically linked to the coverage formula of Section 4 of the Act so as to prevent the continued utilization by states and their subdivisions, primarily in the South, of mechanisms which made it more difficult for such black citizens to register, vote, and thus participate fully in the political process. Because of the unique formula, specifically conceived by the Congress, the applicability of Section 5 designedly fell more heavily on the southern States because of their history of denying and suppressing the black vote.

However, the burdens of Section 5 also fell upon other jurisdictions. Because of a combination of factors, the counties of Bronx, Kings and New York in the State of New York (all located within the City of New York) became subject to the constraints of the Act,¹ and require preclearance of voting changes before implementation. Because New York City includes a myriad of racial and ethnic groups, an analysis of the racially discriminatory purpose or effect of a voting change involves considerations quite different from those involved in the southern basically black-white context. For this reason, a discussion of the various groups covered by the Voting Rights Act is appropriate. The groups in whose behalf complaints have been brought

¹ According to 1970 Census figures, there are more blacks in the Counties of Bronx, Kings and New York than in any single southern state covered by the Voting Rights Act.

to our attention include Blacks, Puerto Ricans, Hasidic Jews, Irish, Polish and Italians.

The Voting Rights Act was enacted to "enforce the Fifteenth Amendment . . . and for other purposes." The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race, color or previous condition of servitude. Both the intent and purpose of the Fifteenth Amendment and the Voting Rights Act appears to have been primarily to eliminate discrimination against Negroes, a group which had been long subjected to discrimination in the voting process because of race.

While the legislative history and judicial interpretations of the Fifteenth Amendment do not identify what groups, if any, other than blacks may be protected by the Amendment, we conclude that Puerto Ricans in New York may be considered within the protections of the Fifteenth Amendment and the Voting Rights Act by virtue of both judicial precedent and Congressional determinations.

In drawing this conclusion we start with the Supreme Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970). The Court's decision in that case dealt with several aspects of the 1970 Voting Rights Act Amendments.² The one of concern here involves the Court's holding constitutional the nationwide suspension of literacy tests.

Although the Court rendered a judgment in which five different opinions were written, eight justices found the ban on literacy tests could be sustained on the basis of the Fifteenth Amendment which prohibits denying or abridging the right to vote on account of race, color or previous condition of servitude. Mr. Justice Black, in his opinion, explicitly said that "the literacy test ban . . . is constitu-

² Some aspects not relevant here included lowering the voting age to 18 for both federal and state elections, and requiring all states to provide absentee registration and balloting opportunities for presidential elections.

tional under . . . the Fifteenth Amendment." 400 U.S. at 132. He then referred at length to the evidence before the Congress showing low voter registration in areas with large Spanish-American populations and showing that similar difficulties confronted Puerto Ricans in New York. 400 U.S. at 132-33. Mr. Justice Brennan, with Justices White and Marshall concurring, found that the literacy tests could be banned under the Fifteenth Amendment, 400 U.S. at 235-236, in large measure because the negative impact of such tests fell "most heavily on blacks and persons of Spanish surname." See, *e.g.*, 400 U.S. at 235.³

These opinions suggest that the Supreme Court found that the Congress had constitutional power under the Fifteenth Amendment to prohibit certain kinds of voting discrimination against at least some Spanish-surnamed Americans, and that the Congress had exercised this power in enacting the 1970 Amendments.

It should also be noted that lower court decisions have also indicated that some Spanish-surnamed Americans are covered by federal statutes which protect the rights of non-white citizens.⁴

Some support for the view that Puerto Ricans are protected generally by all of the provisions of the Voting Rights Act may be seen in the portion of that legislation which explicitly protects that group (Section 4e, 42 U.S.C. 1973b(e)(2)). Although Section 4(e) is predicated on the Fourteenth Amendment, whose design was primarily to address racial discrimination, the Congressional concern with Puerto Ricans may be read to indicate an intention to pro-

³ See also the opinions of Mr. Justice Harlan (400 U.S. at 216) and Mr. Justice Stewart (400 U.S. at 282), the Chief Justice and Mr. Justice Blackmun, concurring.

⁴ See, *e.g.*, *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Ore. 1973) and *Puerto Rican Organization for Political Action, et al. v. Kusper, et al.*, 490 F.2d 575 (7th Cir. 1973).

vide that group with the protection of all the provisions of the Voting Rights Act.

In contrast to the foregoing conclusion regarding Puerto Ricans, there was nothing revealed by our review of the circumstances surrounding the adoption of the Fifteenth Amendment, the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political subdivisions under the Act which indicates that Hasidic Jews or persons of Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act. Nor has material supporting that view been brought to our attention by others. We are forced to conclude, therefore, that given what we now know of relevant precedent, these groups are not among those whose rights the Attorney General is commanded and empowered to protect in his consideration of a submission under Section 5 of the Voting Rights Act. We make no comment, of course, on the relative merits of this congressionally defined scope of coverage and nothing we say here should be interpreted as affecting any other rights accruing to these parties from other sources.

We turn now to the substantive issues involved.

4. *Kings County Congressional Plan—Complaints of Blacks and Puerto Ricans.*

Our analysis of the Congressional districting reveals a basic situation of collectively mutual but individually conflicting interests of blacks and Puerto Ricans. We reach this conclusion because even though these groups as separate entities prefer to have controlling positions in any specific election contest, our review shows that in those instances where black or Puerto Rican candidates have "white" opposition, the two groups tend to unite behind the "minority" candidate. In our experience, this phenom-

enon provides a realistic and practical basis for assessing the effect of the redistricting within the meaning of Section 5.

Under the plan of districting submitted to the Attorney General on January 31, 1974, and to which an objection was interposed on April 1, 1974, Congressional districting showed the following in Kings County:

<i>District #</i>	<i>Black</i>	<i>Puerto Rican</i>
11 (part)	18.9%	8.8%
12	75.9%	13.5%
13	1.9%	1.8%
14	22.0%	24.0%
15	55.4%	8.4%
16	20.9%	3.5%

In evaluating this districting scheme the Attorney General concluded that:

(W)ith respect to the Kings County congressional redistricting, the lines defining district 12 and surrounding districts appear to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts.

Our previous analysis showed that whites constituted 64.9% of the population of Kings County, blacks constituted 24.7% and Puerto Ricans constituted 10.4% of the population. Because of the combined concentration of blacks and Puerto Ricans in the affected area, the Attorney General concluded that he could not certify that the voting strength of those affected groups had not been diluted and therefore, that he had to object to the implementation of that plan under the Voting Rights Act.

As noted above, the plan objected to by the Attorney General on April 1 provided for a district 12 which had a 75.9% black and 13.5% Puerto Rican population, or a combined "minority" population of 89.4%, and a district 14 which was 22% black and 24% Puerto Rican or 46% "minority." The revised plan, presently under submission, shows the following breakdown for those districts.

	<i>Black</i>	<i>Puerto Rican</i>	<i>Combined</i>
District 12	53%	19.2%	72.2%
District 14	45.1%	18.2%	63.3%

Some members of both the black and Puerto Rican communities have registered dissatisfaction with the lines as presently drawn.

According to Puerto Rican spokesmen, the Congressional districting is unsatisfactory because even though the new plan results in two districts with combined "minority" populations of 72% and 63%, the overall effect of the plan is to reduce the Puerto Rican strength from 24% in a single district (old district 14) to 19% (new district 12). They maintain that the plan has the effect of splintering off substantial numbers of Puerto Ricans into districts 11 and 16 and that a district could be created in which Puerto Ricans are a majority.

In order to test and evaluate these contentions we attempted to draw a theoretical plan which would create a majority Puerto Rican district. In addition, we carefully analyzed a plan suggested to us by Puerto Rican spokesmen. In our attempt to maximize Puerto Rican strength, our staff was able to construct a district with no more than 30.2% Puerto Rican population. Our analysis of the district proposed by the Puerto Rican spokesmen revealed a Puerto Rican population there of only 24.6%.

The construction of our alternative resulted in a reduction of the black percentage in what would be district 14 to 28% thus effecting a district which would have a minority population of 58%. The proposal espoused by the Puerto Rican spokesmen would have a 42.8% black population for a minority population of 67%. The former, under all views we have obtained, would not be a viable majority in New York City and the latter, though resulting from an effort to maximize Puerto Rican strength, does not reach the Puerto Ricans' desired goal of acquiring the predominant minority position in a district.

In addition, these theoretical plans result in districts which are not compact and contiguous. It is well to iterate at this point that according to 1970 Census figures Puerto Ricans constitute only 10% of the population of Kings County; that they reside in areas forming a corridor beginning in the Williamsburgh area, running along the northern fringe of the black Bedford-Stuyvesant area and into East New York; and, that the county must be divided into five districts and part of a sixth.

While the effort to maximize Puerto Rican voting strength did result in possible plans which would include a higher percentage of the Puerto Rican population in a single district than does the plan under submission, it is crucial to note that nothing in the law imposes any such duty on the state. Rather, the standard to be used is whether or not the plan as submitted minimizes or cancels out the voting strength of the minority. See, *e.g.*, *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). When the minority population percentage in the submitted plan is viewed against the percentages obtained in the maximized plans, we can hardly conclude that the plan under submission has that effect.

The basic complaint of some of the black representatives is that the new plan reduces the effectiveness of the black voting strength in the Kings congressional. They say that

whereas under the old plan there was one "safe" district (district 12), where the 89.4% minority population could assure the election of a minority candidate, neither of the new districts, in which minorities predominate by 72% and 63% majorities, is high enough in minority population to be "safe." To support this contention they argue that the 72% and 63% figures may be accurate but still are not practical since registration among blacks and Puerto Ricans is significantly lower than among whites. As with the Puerto Ricans, the black complainants maintain that substantial concentrations of blacks and Puerto Ricans in the Oceanhill-Brownsville and Crown Heights area of Brooklyn could be included in what is district 14 of the plan under submission, thus lifting the minority percentage above 72% and 63% in both districts by virtue of the shifting of lines necessitated by such a move.

In assessing these arguments, two basic principles should be kept in mind. First, it is not the function or authority of the Attorney General under Section 5 to devise redistricting plans, or for that matter to dictate to the State of New York specific actions, steps or lines with respect to its own redistricting plan. The only function of the Attorney General under Section 5 is to evaluate a voting change, such as that encompassed in the instant submission, once it has been adopted by the state and submitted for the Attorney General's review, and to determine the limited question of whether the purpose or effect of the change in question is to deny or abridge the right to vote on account of race or color. If no such abridgment or denial exists, the Attorney General must not object to the plan, regardless of the merits or demerits of the plan in other regards, including state, local, and partisan political ones. If an abridgment or denial does exist—as we found in the first submission by New York—the Attorney General must object, stating his reasons, but not drawing a counter plan or commanding any particular state response.

Second, the Voting Rights Act does not guarantee that any particular candidate be elected, nor does it require that any persons actually exercise the voting rights protected by the Act. What it does do is assure that the *opportunity* of the affected minorities to participate freely in the electoral process, and thus elect a candidate of their choice, should not be unlawfully abridged.

In light of these principles, it becomes apparent that none of the contentions raised by these groups provide a basis for the Attorney General to object to the congressional redistricting under review. In addition to the fact that the law does not require the state to "maximize" minority voting strength through gerrymandering or other artificial devices, the facts in this case—particularly the geographical dispersion of Puerto Rican neighborhoods throughout Kings County—show that it is virtually impossible to draw a majority Puerto Rican congressional district. They show further that even a 30% Puerto Rican district is attainable only by considerable gerrymandering. In this regard, and with respect to complaints of both groups, we repeat the test defined by the courts is not whether districts still more favorable to minorities can be drawn but, rather, whether the districts as drawn have the effect of minimizing minority voting strength.

As far as the blacks' argument on the meaning of the 72% and 63% majorities is concerned, in our view these population majorities, even allowing *arguendo* for a lower voting age population among blacks and Puerto Ricans, provide a realistic opportunity for minorities to elect a candidate of their choice. Whether or not those minorities choose to exercise their right by registering and voting is obviously a matter of great concern, but as a matter of law, it is not one upon which the Attorney General can base an objection, at least not in the context of this submission.

5. *Hasidic Jews and Other Ethnic Groups.*

Perhaps the largest single group of complaints have come from the Hasidic Jewish community in the Williamsburgh area and from the Irish, Italian and Polish communities in North Brooklyn. These groups complain that the senatorial and assemblymanic districts, but primarily the senatorial districts, dilute their voting strength by splitting their communities into districts which join them with blacks and Puerto Ricans from the adjacent Bedford-Stuyvesant area. Particular concern has been expressed over the division of the old senatorial districts represented by State Senators Chester Straub and Carol Bellamy. Petitions with over 7,000 signatures objecting to the senatorial redistricting in that area have been received.

While it is unquestionable that the redistricting done by the state in an effort to meet the prior objection of the Attorney General has affected the Hasidic Jewish community in Williamsburgh and the ethnic communities in North Brooklyn, the issues raised are not ones which the Attorney General has authority to determine under the provisions of Section 5 of the Voting Rights Act (See Section 3, above). The pendency of litigation in Eastern District of New York involving these districts regrettably precludes more extended discussion here.

6. *New York County Senatorial Plan.*

Another portion of the redistricting as to which major opposition has been received is the New York County senatorial plan. A history of this plan is appropriate to our review of this matter.

The Attorney General's objection to this aspect of the previous redistricting plan stated that:

(T)he lines defining district 28 in West Harlem appear to reduce significantly the minority voting strength in

that area. Significant portions of minority neighborhoods in that area (district 27 under the old plan) have been removed to proposed district 29 with apparent dilutive effect.

Under the plan then being evaluated, blacks and Puerto Ricans constituted 55.6% of district 28 and 47.3% of district 19.

In its efforts to meet the Attorney General's objection, The Joint Committee on Reapportionment devised a plan which resulted in a district 28 with a minority population of 82.8% and a district 29 with 27.5% minority population. However, one faction in the minority community prevailed upon the Committee to adopt instead an alternative in which district 28 had 64.1% minority population and district 29 had 44.1% minority. The latter plan is the one adopted by the state and presently under submission.

Perhaps the most documented opposition to this portion of the plan has come from the incumbent in the 71st Assembly District, Assemblyman Franz Leichter. Mr. Leichter's position is that the difference between the minority percentage in the plan objected to and the one under submission does not demonstrate that the districts have been so significantly changed as to meet the Attorney General's objection. In support of his position he points to inconsistencies in statistics provided by the state and argues that the difference between the two plans is even smaller than that reflected in the objectionable 55.6 and resubmitted 64.1 minority percentages furnished us by the state.

In addition to Assemblyman Leichter's complaint, some blacks have registered their dissatisfaction with district 28 and maintain, with some factual substantiation, that district 28 as submitted was designed solely to preserve the seat of the black incumbent.

We have evaluated in depth the contention of Assemblyman Leichter and find that while he is substantially correct in his claim of a statistical discrepancy, the error does not materially affect the lawfulness of the submission. The error related to calculations made in connection with the plan to which the Attorney General previously objected, so that whereas the state advised us that that plan had a minority percentage of 55.6%, the actual percentage was approximately 58.5% minority.

Because of that discrepancy, there is some merit to Assemblyman Leichter's argument that the difference is not as substantial as it appears and, given other circumstances, we might conclude, as he does, that the difference is insufficient to remove the previous objection. The fact is that even though the objection was based on our belief that district 28 was 55.6% minority, it is likely that the same result would have obtained had the more accurate percentage of 58.5% been known. However, under our analysis the 64.1% minority population in the instant plan is acceptable regardless of what the earlier figure actually was. Besides, as we note above, the Voting Rights Act assures affected minorities the opportunity for free participation in the political process. Where, as here, it is clear not only that minorities have participated in the political process, but that the plan was drawn as it is because of the insistence of a substantial faction of the minority community, we do not believe that the purpose of the Act would be served by an Attorney General objection. Again the question we must answer is not whether a plan might be conceived with a majority of blacks and Puerto Ricans even more decisive than the 64.1% majority now submitted by the state. Rather, the issue here is whether the adopted plan dilutes minority voting rights.

Nor do we find authority in the Act for the proposition that the Attorney General may, under the circumstances here, interpose an objection to a change on the ground that

it is not satisfactory to all segments of the minority community.

For the foregoing reasons, we conclude that there is no basis for an Attorney General objection and recommend that an appropriate notification be mailed promptly to the submitting authority.

Respectfully submitted,

/s/ JAMES P. TURNER
James P. Turner
Deputy Assistant Attorney General

/s/ GERALD W. JONES
Gerald W. Jones, Chief
Voting and Public Accommodations
Section

Approved:

/s/ J. STANLEY POTTINGER
J. Stanley Pottinger
Assistant Attorney General

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

[Caption omitted]

Civil Action No. 74C-877

Answer

The defendants, MALCOLM WILSON, JOHN GHEZZI, WARREN ANDERSON, and PERRY DURYEA, JR. answer the complaint as follows:

First Defense

The complaint fails to state a claim against the above named defendants upon which relief can be granted.

Second Defense

1. Defendants deny the allegations of paragraph "1" of the complaint except as it describes the nature of the cause of action upon which the complaint is founded.

2. Defendants deny the allegations of paragraph "2" of the complaint.

3. Defendants admit the allegations of paragraph "3" of the complaint.

4. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the first two sentences of paragraph "4" of the complaint, deny the third sentence and admit the fourth sentence of that paragraph.

5. Defendants admit the allegations of paragraph "5" of the complaint.

6. Defendants admit the allegations of paragraph "6" of the complaint.

7. Defendants admit the allegations of the first two sentences of paragraph "7" of the complaint and assert that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in the third and fourth sentences of paragraph "7."

8. Defendants deny the allegations in the first sentence and admit the allegations in the second sentence of paragraph "8" of the complaint.

9. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "9" of the complaint.

10. Defendants admit the allegations in paragraphs "10" and "11" of the complaint, but deny that the district lines established by the Judicial Commission in March, 1966 or by the New York Legislature in 1971 necessarily reflect recognition by the Judicial Commission or the New York Legislature of the unity of the area described in paragraph "5" of the complaint.

11. Defendants admit the allegations in paragraphs "12, 13, 14, 15 and 16" of the complaint.

12. Defendants admit the allegations in the first sentence of paragraph "17" of the complaint, but deny the allegations in the second sentence of that paragraph.

13. Defendants admit the allegations of paragraph "18" of the complaint.

14. Defendants admit the allegations of paragraph "19" of the complaint.

15. Defendants deny the allegations of paragraph "20" of the complaint but admit that the Joint Committee did consider the racial composition of the proposed districts to the extent necessary to effect compliance with the Federal Voting Rights Act of 1965, as amended, and to overcome the objections to the 1972 district lines that were

expressed by the United States Department of Justice in its determination of April 1, 1974.

16. Defendants admit the allegations of paragraphs "21" and "22" of the complaint.

17. Defendants deny the allegations in paragraph "23" of the complaint.

18. Defendants deny the allegations of paragraph "24" of the complaint except insofar as it describes the boundaries of certain Assembly and Senate Districts.

19. Defendants deny the first sentence in paragraph "25" of the complaint, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of that paragraph.

20. Defendants deny the allegations of paragraphs "26," "27," and "28" of the complaint.

21. Defendants deny the first sentence in paragraph "29" of the complaint, and allege that on July 1, 1974, the Attorney General of the United States issued a determination pursuant to Section 5 of the Voting Rights Act that he had no objection to Chapters 588, 589, 590 and 591 of the New York Laws of 1974. A copy of that determination is annexed hereto as Exhibit "A."

22. Defendants admit the allegations of paragraph "30" of the complaint.

23. Defendants deny the allegations of paragraph "31" of the complaint.

WHEREFORE, defendants demand judgment that the complaint herein be dismissed.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for defendants Malcolm
Wilson, John Ghezzi, Warren An-
derson, and Perry Duryea, Jr.
By

/s/ GEORGE D. ZUCKERMAN
George D. Zuckerman
Assistant Attorney General
Two World Trade Center
New York, New York 10047
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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 74C-877

[Caption omitted]

Notice of Appeal

Notice is hereby given that the United Jewish Organiza-
tions of Williamsburgh, Inc., *et al.*, plaintiffs above named,
hereby appeal to the United States Court of Appeals for
the Second Circuit from the order denying plaintiffs tem-
porary relief, entered in this action on the 20th day of June
1974, and the *de facto* denial of plaintiffs' Motion for a
Preliminary Injunction, which motion was filed on June 20,
1974.

/s/ NATHAN LEWIN
Nathan Lewin

DENNIS RAPPS

Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-C-877

[Caption omitted]

**Motion for Injunction Pending Appeal and for
Expedited Briefing and Argument**

SUMMARY OF EVENTS

This action challenges the constitutionality of a legislative reapportionment plan enacted by the New York Legislature on May 27, 1974. In its present posture, it relates to only two State Senate and State Assembly districts which were, in the view of the plaintiffs, drawn according to unconstitutional racial standards demanded of the New York Legislature by the Attorney General of the United States. The effect of the reapportionment was to divide and dilute the plaintiffs' voting power by splitting their community—which had always been in a single Senate and Assembly district between two such districts.

There was no advance warning whatsoever to the plaintiffs that they would be harmed as they were by the action of the New York Legislature, and within two weeks of the enactment of the challenged law, this proceeding was instituted. In order to provide full notice and opportunity to be heard to all interested parties, the plaintiffs set their Motion for a Temporary Restraining Order for June 17, 1974—six days after the complaint was filed. That date—June 17—was the first date for designating petitions for candidates in the primary election to be held on September 10, 1974. The temporary relief requested of the District Court was an order freezing the *status quo* and prohibiting the implementation of the new district lines. Various parties appeared as *amici* and potential intervenors on

June 17, 1974, and each stated its position. At the conclusion of the morning's hearing (during which, by oversight, no reported was present), the District Judge (Bruchhausen, J.) said he would enter a temporary restraining order and requested counsel for the parties to settle on its terms.

Discussion was had during the following period of one to one-and-a-half hours among counsel, with no agreement being reached. Counsel so advised the Court, and the open hearing was resumed. Judge Bruchhausen indicated at that time that he would sign an order along the lines proposed by plaintiffs' counsel, which would have advanced by four days—*i.e.*, until the hearing on a motion for preliminary injunction—the first date for legal signatures on designating petitions. (Tr. of June 17, 1974, pp. 6-7; a copy of the Transcript of that session is attached to this Motion.) After plaintiffs' counsel stated the substance of such a suggestion, Judge Bruchhausen said, "We have been unduly lengthy on this whole matter and I would agree on that" (Tr. 7). Corporation Counsel then argued that such an order was undesirable and unnecessary because no harm would be caused if the lines were declared invalid on June 21 (Tr. 8). Thereafter, counsel for the Kings County Republican County Committee, who had first noted his appearance *after* the recess (Tr. 3), advised the Court that "a couple of hundred Republicans" were out ringing doorbells to obtain signatures on petitions and that the Republican Party had distributed county election kits to "hundreds upon hundreds of workers throughout this county," so that, in his view, an order maintaining the status quo would "disenfranchise the voters from nominating their candidates" (Tr. 10). In the midst of this presentation, the following colloquy (Tr. 10):

THE COURT: You are against the TRO?

MR. BONINA: Yes, Your Honor.

When Mr. Bonina finished, Judge Bruchhausen made the following announcement (Tr. 11):

THE COURT: Very well.

Once, once in awhile, I reverse myself. I think I have heard enough pro and con.

I will not enter the TRO.

June 17, 1974—six days after the complaint was filed Refusing to hear any further argument, the judge then left the bench (Tr. 12).

Rather than seeking review in this Court of that preliminary ruling, plaintiffs proceeded four days thereafter—on June 20, 1974—to present a full day of testimony and argument to support their request for a preliminary injunction against enforcement of the district lines which split their community. The urgency of a prompt ruling was emphasized at the conclusion of the hearing, when Judge Bruchhausen requested the submission of legal memoranda (Tr. of June 20, 1974, pp. 179-181). The following colloquy is representative (Tr. 180-181):

MR. LEWIN: Because of the urgency of the matter we would like to be able to file everything really by I suppose Tuesday morning.

THE COURT: I won't hurry you, I will just put down whatever time you say you feel you would want.

MR. LEWIN: We would want to hurry things along, we think it is important that it be decided as early as possible.

THE COURT: I will leave it to you to submit your memorandum, I will say that.

MR. LEWIN: If we can schedule it—

MR. ZUCKERMAN: If we can be served, well whenever we are served I hope to have an answering memorandum within three days after being served.

THE COURT: Well, all right, I don't think there will be any disagreement on that.

MR. LEWIN: It is just as we say, we recognize that the clock is running against us and we are sure that no matter how fast your Honor decides this case, judging by the diversity of views expressed in the courtroom, somebody will take it to the Court of Appeals, and that is going to make it that much later, so—

THE COURT: Well, I don't like to deprive the Court of Appeals of business, I will say that.

MR. LEWIN: So our feeling is that we are going to get it done as soon as possible, and we would hope that if all the other parties in the action are required to file, that they file within three days after our filing, and—

THE COURT: That is understood. We will leave it that way, then. So all sides rest and memoranda will come within the time stated.

The filing of initial memoranda was completed on June 28, 1974. By today—three weeks after the hearing and two weeks after the basic memoranda were filed—there has been no ruling from Judge Bruchhausen on the motion for preliminary injunction or on the plaintiffs' motion for summary judgment which was filed on June 25, 1974.

In an ordinary case, a two-week delay would not, of course, be reason for seeking appellate action. But each day is extremely critical when what is involved is the question whether the 1974 election will take place under the unconstitutional lines drawn by the New York Legislature. Although plaintiffs initially sought relief on the first day for circulation of designating petitions—and were told then by the Corporation Counsel that no one would be harmed if such petitions were circulated under the chal-

lenged lines even if they were subsequently declared invalid—they now find themselves faced with the termination of the petition-circulating process. According to New York Election Law § 149-a(4), the petitions must be filed between July 11 and July 15, 1974. Consequently, unless this Court issues an immediate injunction extending the date for filing designating petitions beyond July 15 for the 56th and 57th Assembly Districts and for the 23rd and 25th Senatorial Districts, the lines drawn for this election will have passed their first stage—*i.e.*, the candidates designated in those unconstitutionally defined districts will be the ones appearing on the ballot for the September 10 primary.

No relief can be obtained, in this regard, from the District Court. As the attached affidavit of David J. Butler (Attachment II establishes, the District Judge is now on vacation and there is no indication as to when he will return and when a ruling can be expected in this case. Accordingly, the plaintiffs have filed a Notice of Appeal from both the ruling of June 17, 1974, and from Judge Bruchhausen's failure to issue a meaningfully timely ruling on their motion for a preliminary injunction (Attachment III). The purpose of this application is to obtain an order from this Court that will keep this case from being mooted—so far as the 1974 election is concerned—by a continued lack of judicial action in the District Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 71-1943

[Caption omitted]

Motion to Dismiss Appeal

PRELIMINARY STATEMENT

This is an action challenging the constitutionality of certain aspects of the legislative reapportionment plan enacted by the State of New York on May 27, 1974. That reapportionment was the result of two years of litigation by the N.A.A.C.P., etc., et al., which culminated on April 1, 1974, with a determination by the Assistant Attorney General of the United States that New York's 1972 district lines had the effect of discriminating on the basis of race, in violation of the federal Voting Rights Act, 42 U.S.C. § 1973 b. See *New York v. United States*, No. 2419-71 (D.D.C.); *N.A.A.C.P. v. New York City Board of Elections*, No. 72 Civ. 1460 (S.D.N.Y.). The Assistant Attorney General's decision had the force of law under the Voting Rights Act, and compelled New York to enact the new lines under attack. Plaintiffs appear to claim either that the 1972 lines were not discriminatory, or that even if they were New York could not constitutionally remedy that discrimination.

In the District Court proceedings the N.A.A.C.P., although unquestionably one of the real parties in interest, was not named as a defendant. The N.A.A.C.P. promptly moved to intervene. The District Court, while not granting that motion, permitted counsel for the N.A.A.C.P. to participate in those proceedings. The N.A.A.C.P. has requested that Judge Bruchhausen formally permit intervention to

assure the right of the N.A.A.C.P. to participate fully in all appellate proceedings. That request is still pending in the District Court.

The Appeal Should Be Dismissed

The complaint in this action was filed on June 11, 1974. On June 17, 1974, plaintiffs unsuccessfully sought a Temporary Restraining Order from the District Court. An evidentiary hearing regarding plaintiffs request for a Preliminary Injunction was held on June 20, 1974. Thereafter plaintiffs moved for summary judgment and the defendants, including the N.A.A.C.P., moved to dismiss the action for failure to state a claim on which relief can be granted. Federal Rules of Civil Procedure, Rule 12(b) (6). On July 12, 1974, without awaiting a decision on their cross motions, plaintiffs appealed to this Court.

The District Court has not formally denied plaintiffs' motion for a preliminary injunction. Nor has it stayed proceedings for a particular period or indefinitely. Compare *Kelley v. Metropolitan County Board of Education*, 436 F.2d 856, 862 (6th Cir. 1970). Plaintiff complains, rather, that the District Court is not acting with sufficient dispatch, and that the resulting delay is equivalent to a denial of the preliminary injunction. Accordingly plaintiff seeks to bypass the District Court and proceed directly to the Court of Appeals.

Whether the District Court has so unjustifiably delayed a decision as to abuse its discretion must depend on the facts of each case. The instant complaint was filed on June 11, 1974. An evidentiary hearing on plaintiffs' request for a preliminary injunction was held on June 20, 1974. Plaintiffs submitted a memorandum in support of the injunction on June 25, 1974, and the defendants and N.A.A.C.P. submitted memoranda on June 28, 1974. Plaintiffs imply that this was the end of the briefing, and that Judge Bruch-

hausen thereafter inexplicably refused to act. Appellants' Motion, p. 5. That is not the case.

On July 1, 1974, plaintiffs filed a second memorandum on the questions before the District Court. Memorandum in Response to Motion to Dismiss of the Attorney General of the United States. Also on July 1, 1974, the Assistant Attorney General of the United States acting pursuant to the Voting Rights Act, approved the 1974 district lines challenged in this action. This decision altered the legal posture of the case, and required further briefing. On July 3, 1974, the state defendants filed a copy of the July 1, decision and supporting memorandum. On July 8, 1974, plaintiffs submitted a third memorandum to the District Court, entitled Supplemental Memorandum for the Plaintiffs. On July 9, 1974, the N.A.A.C.P. also submitted a Supplemental Memorandum dealing with the legal significance of the July 1 decision. Also on July 9, 1974 Judge Bruchhausen's clerk telephoned counsel for the parties to ascertain whether any further memoranda were contemplated. Counsel indicated that no further memoranda would be filed, and that the case was ready for a decision. Three days later on July 12, 1974, plaintiffs appealed from Judge Bruchhausen's "refusal" to act.

These facts clearly do not reveal any abuse of discretion or inordinate delay by the District Court. Certainly the District Court was not obligated to decide in three days the complex issues presented by this litigation. Nor would it have been proper for the District Court to issue a decision before the filing of supplementary memoranda regarding the July 1, 1974 decision of Assistant Attorney General Pottinger. Plaintiffs did not object to the submission of supplementary memoranda, but on two occasions filed such memoranda of its own.

This case would not be more different from *United States v. Lynd*, 301 F. 2d 818 (5th Cir.) cert. denied 371 U.S. 393 (1962). In *Lynd* the complaint had been filed in

July of 1961. After a series of "dilatory motions", the request for a preliminary injunction come on for trial in March of 1962. At the end of the hearing the District Court granted the defendants a 30 day adjournment to prepare their witnesses and file an Answer. Faced with cumulative delays totaling 8 months, the United States appealed, and the Fifth Circuit held the district court's refusal to act constituted a denial of injunctive relief. Similarly in *Kelley v. Metropolitan County Board of Education*, 436 F.2d 856, 862 (6th Cir. 1970), the district court had entered an order formally staying for an indefinite period all proceedings and requests for injunctive relief. The instant case does not involve such inordinate delays.

Section 1292(a), 28 U.S.C. provides that appeals may only be taken to this Court from orders granting or denying preliminary injunctions. Plaintiffs urge that this Court hold that there has been such a "denial" whenever a district court fails to decide a case within 76 hours after the completion of briefing. If such a rule were adopted, this Court would doubtless be flooded with such interlocutory appeals by plaintiffs anxious to bypass proceedings in the district courts. The Courts of Appeals are not *nisi prius* courts; they sit to review the considered decisions of the district courts. Only after such a decision by Judge Bruchhausen are appellate proceedings appropriate.

In the absence of any denial of a preliminary injunction there is no jurisdiction under 28 U.S.C. § 1292(a), and this appeal must be dismissed.

No Injunctive Relief Pending Appeal Should Be Granted

Even if this Court had jurisdiction over this appeal, the injunctive relief sought by plaintiffs on appeal would have to be denied.

Plaintiffs seek two forms of injunctive relief from this Court: (1) an order extending the deadline for circulation

of nominating petitions in certain districts until 2 weeks after a decision by this Court on the merits (2) an order instructing the State to prepare certain alternative districting plans. Neither form of injunctive relief was ever requested from the District Court. Neither plaintiffs' proposed temporary restraining order nor the preliminary injunction requested from the court below asked for either of these forms of relief. Whatever the merits of these proposals, they must first be presented to the United States District Court where, if needed, an appropriate evidentiary record could be developed.

No substantial ground has been even alleged to warrant granting the injunctive relief requested. With regard to the period for circulating nominating petitions candidates have by now completed gathering petitions for the districts as they presently exist. Should redistricting be ordered, the changes plaintiffs seek are so small, involving less than 10% of the population of each district, as not to require reopening the petition process to new candidates. The delay plaintiffs propose would seriously interfere with the operations of the New York City Board of Elections, which must review the petition signatures and prepare ballots in the immediate future. Nor has any need been shown to require the state to prepare alternative districting plans along the lines discussed at the District Court hearing by Mr. Richard Scolaro, Executive Director of the Joint Legislative Committee on Reapportionment. Even if plaintiffs were to prevail on the merits, it is impossible to anticipate at this time the legal standards which the Court might establish for any new plans.

Expedited Briefing and Argument

The N.A.A.C.P., etc., et al., would not oppose an expedited schedule for briefing and argument if necessary to obtain timely and meaningful relief of a decision by the District Court.

In the instant case, however, it is likely that even if the schedule proposed by plaintiffs were adopted and plaintiffs were to prevail on the merits, a new reapportionment could not be fashioned in time for use in the upcoming September 10 primary. All changes in election laws in Brooklyn cannot be put into effect without prior federal approval under the Voting Rights Act, 42 U.S.C. § 1973c. This includes changes in district lines. *United States v. Georgia*, 411 U.S. 526 (1973). Under section 5 of the Voting Rights Act approval may be obtained either from the Attorney General of the United States pursuant to a procedure which normally requires 60 days, or from a special three judge District Court for the District of Columbia. Any attempt to enforce new district lines without the required federal approval would fall within the purview of a three judge federal court already impaneled in the Southern District of New York to enjoin just such violations of the Voting Rights Act. *N.A.A.C.P. v. New York City Board of Elections*, No. 72 Civ. 1460 (S.D.N.Y.).

Finally, we are constrained to clarify the nature of the controversy presented by this case. Plaintiffs suggest that, for some mysterious reason, the State Legislature and the Assistant Attorney General of the United States decided that they wanted more Blacks and fewer whites in public office, and gerrymandered certain legislative districts to accomplish this result. The actual facts are somewhat different. The federal Voting Rights Act forbids the use of district lines which have the effect of discriminating on the basis of race. On April 1, 1974, the Assistant Attorney General of the United States ruled that New York's 1972 district lines in Brooklyn had such a discriminatory effect and this violated the Act. That decision was not appealed from and is final. Thereafter the Legislature enacted new lines which were intended to end this discriminatory effect, and which the Assistant Attorney General ruled on July 1, 1974, had in fact ended that discrimination. The questions

presented by this litigation, are, not whether the Legislature can arbitrarily discriminate against whites, but (1) Whether the decision of April 1, 1974, of the Assistant Attorney General, is reviewable in this action? (2) Whether that decision erroneously concluded that New York's 1972 lines had a discriminatory effect? (3) Whether the Voting Rights Act, insofar as it prohibits district lines with a discriminatory effect, is unconstitutional? and (4) Whether the instant plaintiffs have standing to litigate any of these issues? We submit that none of these questions are substantial, and that plaintiffs complaint clearly failed to state a claim upon which relief could be granted.

Respectfully submitted,

/s/ ERIC SCHNAPPER

Jack Greenberg

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the

(No. 31 7-16-74)
74-1943

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Court House, in the City of New York, on the sixteenth
day of July, one thousand nine hundred and seventy-four.
UNITED JEWISH ORGANIZATION OF WILLIAMSBURGH, INC. et al.,
Plaintiffs-Appellants,

v.

MALCOLM WILSON, et al.,
Defendants-Appellees.

It is hereby ordered that the motion made herein by
counsel for the appellants dated July 12, 1974 for an in-
junction pending appeal and to expedite the hearing of the
appeal be and it hereby is denied without prejudice to
renewal.

A. DANIEL FUSARO
Clerk

By /s/ [Illegible]
Senior Deputy Clerk

* * *

Before: HON. HARRISON L. WINTER,
HON. WILLIAM H. MULLIGAN,
Circuit Judges
HON. JON O. NEWMAN,
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 74 C 877

[Caption omitted]

July 25, 1974

BRUCHHAUSEN, D. J.

This suit was instituted to declare the recently drawn
redistricted lines of the State Senatorial, State Assembly
and U.S. Congressional Districts in Kings County, pursu-
ant to Chapters 588, 589, 590, 591 and 599 of the New
York Laws of 1974, unconstitutional.

On April 1, 1974, the Attorney General of the United
States through his authorized representative, J. Stanley
Pottinger, contacted the office of the Attorney General of
the State of New York advising him that the Assemblanic,
Senatorial and Congressional district lines in Kings
County established pursuant to the applicable laws of
1972 were invalid under Section 5 of the Voting Rights
Act because it was determined by the Attorney General of
the United States that those lines would produce a racially
discriminatory effect, Exhibit VI annexed to the com-
plaint. That determination precluded the use of those
district lines within Kings County. The Attorney General
of the State of New York concluded to accept that deter-
mination and not to appeal the decision of Mr. Pottinger.
It is alleged in the memorandum of the N.A.A.C.P. and
not controverted that several groups sought to appeal
the ruling of Mr. Pottinger, but met with failure when
their actions were dismissed by the District Court for the
District of Columbia. The New York State Legislature on
May 30, 1974 enacted new lines in an attempt to com-
ply with removing any discriminatory aspects of the
1972 lines, and to comply with the determination of the
Attorney General of the United States. These new lines

were submitted for approval, pursuant to the Voting Rights Act.

It is alleged that the 1974 redistricting laws violate the rights of the plaintiffs in denying them the equal protection of the laws and in depriving them of liberty without due process of law in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and are, consequently, invalid. In short, the plaintiffs, members of the Hasidic community in Williamsburg, object to be divided into separate senatorial and assembly districts by the challenged 1974 State statutes.

The defendants then moved for a dismissal of the complaint for failure to state a claim for which relief can be granted and for lack of jurisdiction.

Subsequent to a full hearing before this Court, on July 1, 1974, Mr. J. Stanley Pottinger, acting on behalf of the Attorney General of the United States, gave approval of the new 1974 lines as not being violative of the Voting Rights Act. See letter addressed to the Attorney General of the State of New York together with a Memorandum and Decision attached to the Supplemental Memorandum for the N.A.A.C.P., appearing as *amicus curiae*.

The position of the plaintiffs is untenable, and the motions of the defendants to dismiss are granted.

In view of the approval of the 1974 lines by the office of the Attorney General of the United States, the cause of action brought pursuant to the Voting Rights Act must be dismissed. In *Allen v. State Board of Elections*, 393 U.S. 544, the Court held in part at page 548:

"In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), we held the provisions of the Act involved in these cases to be constitutional. These cases merely require us to determine whether the various state

enactments involved are subject to the requirements of the Act."

The Court further held in part at pages 549, 550:

"***Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5."

The allegations by the plaintiffs of a violation of their rights pursuant to the Fourteenth and Fifteenth Amendments to the Constitution are also untenable. Jurisdiction is noted pursuant to 28 U.S.C. 1343, and 42 U.S.C.A. 1983.

In *Ince v. Rockerfeller*, 290 F. Supp. 878, the Court held in part at page 883:

"***Pleas for separate community recognition, similar to those raised by plaintiffs here, were made by intervenors from Flatbush and Bay Ridge in contesting the recently enacted congressional districts in New York State. In rejecting their contentions, the three-judge Court in its unanimous opinion in *Wells v. Rockefeller*, 281 F. Supp. 821, 825 (S.D.N.Y. 1968) stated:

"The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side. The twenty or more identifiable communities of Brooklyn may well have preserved their own traditions from the days of the Dutch, although in today's rapidly changing world, this is doubtful. But even Brooklyn's large population will not support twenty community congressmen. Of necessity, there must be lines which divide."

It is further well settled that there is no federal constitutional right either to contiguity or compactness of voting districts. *Wood v. Broom*, 287 U.S. 1.

The case at bar is unlike that in *Gomillion v. Lightfoot*, 364 U.S. 339 where the Alabama legislature by alteration excluded all but five of 400 Negro voters from the City of Tuskegee voting rolls. In this case as in the *Ince* case, *supra*, no one is being disenfranchised by the redistricting and no voting right is being extinguished.

It is further well settled that racial considerations have been approved to correct a wrong. The use of a pupil assignment plan, based on race, was upheld in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1.

In *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir., 1968), racial considerations were sustained in promoting integration. See also *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir., 1973).

In the field of labor, racial quotas requiring preferential hiring were sustained to overcome prior discrimination, *Associated General Contractors of Mass. Inc. v. Altshuler*, 490 F.2d 9, cert. denied U.S. (1974), 42 U.S.L.W. 3594 (1974).

The Court after careful consideration of the record, arguments and applicable law concludes that the plaintiffs' motions for a preliminary injunction and summary judgment be denied. The defendants' motions to dismiss the complaint are granted.

It is so ordered.

Copies hereof are being forwarded to the respective attorneys.

/s/ WALTER BRUCHHAUSEN
Walter Bruchhausen
Senior U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action 74C 877

[Caption omitted]

Notice of Appeal

Notice is hereby given that the United Jewish Organizations of Williamsburgh, Inc., et al., plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered in this action on July 25, 1974, dismissing the plaintiffs' Complaint and denying plaintiff's motion for preliminary injunction.

/s/ NATHAN LEWIN (D.R.)
Nathan Lewin

/s/ DENNIS RAPPS
Dennis Rapps

Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1251—September Term, 1973.
(Argued August 16, 1974 Decided August 23, 1974.)
Docket No. 74-2037

UNITED JEWISH ORGANIZATIONS
OF WILLIAMSBURGH, INC., et al.,
Plaintiffs-Appellants,

MALCOLM WILSON, et al.,
Defendants-Appellees,

N.A.A.C.P., et al.,
Intervenors-Appellees.

Before:

OAKES, *Circuit Judge,*
FRANKEL and KELLEHER, *District Judges.**

Appeal from an order of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*, denying the plaintiffs' motion for a preliminary injunction and dismissing the complaint for failure to state a claim upon which relief could be granted.

Denial of preliminary injunction affirmed; opinion and final determination of the appeal to follow.

* Of the Southern District of New York and the Central District of California, respectively, sitting by designation.

NATHAN LEWIN, Esq., Washington, D.C. (Miller, Cassidy, Larroca & Lewin, Esqs., Dennis Rapps, Esq., Brooklyn, N.Y., of counsel), *for Plaintiffs-Appellants.*

GEORGE D. ZUCKERMAN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, New York, N.Y., of counsel), *for Defendants-Appellees Wilson, Ghezzi, Anderson and Duryea.*

GERALD W. JONES, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York, J. Stanley Pottinger, Assistant Attorney General, Walter Gorman and S. Michael Seadron, Attorneys, Department of Justice, Washington, D.C., of counsel), *for Defendant-Appellee Sarbe.*

IRWIN L. HERZOG, Assistant Corporation Counsel for the City of New York, New York, N.Y., *for Defendant-Appellee The Board of Elections of the City of New York.*

ERIC SCHNAPPER, Esq., New York, N.Y. (Jack Greenberg, Esq., of counsel), *for Intervenors-Appellees.*

PER CURIAM:

Having studied the papers and heard argument, the court concludes that the District Court's order denying the motion for a preliminary injunction should be, and it is, affirmed. In the interests of the parties and of others who may be affected, this ruling is issued today. An opinion will be filed hereafter discussing this determination and finally disposing of the appeal.

It is so ordered.

Supreme Court, U. S.
FILED

SEP 2 1975

MICHAEL ROBAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1975
No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,

Petitioners,

v.

HUGH L. CAREY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS-INTERVENORS
IN OPPOSITION**

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Counsel for Respondents-Intervenors

IN THE
Supreme Court of the United States
October Term, 1975
No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,

Petitioners,

v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS-INTERVENORS
IN OPPOSITION**

Opinions Below

The opinion of the Court of Appeals (Appendix E of the Petition) is reported at 510 F.2d 512. The opinion of the District Court (Appendix H of the Petition) is reported at 377 F.Supp. 1164.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Do the Fourteenth and Fifteenth Amendments prohibit New York from adopting district lines designed to overcome the discriminatory effect of an earlier districting plan?

Statement of the Case

In January, 1972, the State of New York enacted legislation altering, *inter alia*, the Senate and Assembly lines in Kings County (Brooklyn). Chapter 11, Laws of New York, 1972. On January 31, 1974, New York submitted these 1972 district lines to the Attorney General of the United States for his approval under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. On April 1, 1974, Assistant Attorney General J. Stanley Pottinger, acting on behalf of the Attorney General, disapproved the 1972 redistricting in Kings County on the ground that it have the effect of discriminating against non-whites on the basis of race.

On May 30, 1974, New York adopted a new set of district lines designed to remove the discriminatory aspects of the lines disapproved by the Attorney General. Chs. 588, 589, 590, 591 and 599, Laws of New York, 1974. On July 1, 1974, Assistant Attorney General Pottinger approved the 1974 lines as sufficient to eliminate the discriminatory effect of the old 1972 lines.

On June 11, 1974, petitioners commenced this action in the United States District Court for the Eastern District of New York, alleging that the 1974 lines discriminated against whites, and seeking to compel New York to hold elections using the 1972 lines which the Attorney General had already disapproved. The district court permitted the respondent-intervenors, several individuals and a branch of

the N.A.A.C.P., to intervene as defendants. On July 25, 1974, the district court dismissed the complaint, holding that the 1974 district lines were constitutional and had properly been enacted to correct the discriminatory aspects of the 1972 lines.¹ On January 6, 1975, the Court of Appeals for the Second Circuit affirmed that dismissal.²

Reasons for Denying the Writ

Petitioners suggest first that the Attorney General erred when he disapproved the 1972 district lines. The record before the Attorney General revealed that the 1972 lines, as previous redistricting, had been drawn so as to keep in office, despite a growing non-white population in Kings County, white members of the Assembly and Senate. The vast majority of non-whites were concentrated in a contiguous ghetto in and around the Bedford-Stuyvesant area. The gerrymandering was accomplished by pairing non-white neighborhoods with far larger white areas, so that most non-white voters were placed in districts with substantial white majorities. Voting patterns clearly indicated that white voters voted as a block against a black or Puerto Rican candidate and that no black or Puerto Rican had ever been elected to the legislature from Kings County by a district with a majority of white voters. As a result of this gerrymandering, although 35.6% of the population of Kings County was non-white, only 11.7% of the Senate districts and 23.2% of the Assembly districts had non-white majorities. There were 574,811 non-whites living in predominantly white Senate districts, but only 44,081 whites living in predominantly non-white Senate districts. Similarly, there were 361,707 non-whites living in predominantly white Assembly districts, but only 135,260 whites living in

¹ Petition 53a-58a.

² Petition 7a-50a.

predominantly non-white Assembly districts. In this manner a majority of blacks and Puerto Ricans in Kings County were gerrymandered into districts where a black or Puerto Rican candidate could not be elected, and were thus effectively disenfranchised. Statistical analysis indicated that the few non-white districts, placed at the very center of the ghetto, were quite compact, but the white districts used to disenfranchise non-white voters were far from compact since they were drawn to pair ghetto communities with larger white areas miles away.³ In view of this evidence the Attorney General concluded that New York had failed to establish that the 1972 lines would not have the effect of discriminating against black and Puerto Rican voters.

Petitioners challenge the Attorney General's decision on several grounds. First, petitioners suggest that the Attorney General could only disapprove the 1972 lines if they had been adopted for the purpose of discriminating on the basis of race.⁴ Section 5 of the Voting Rights Act, however, requires that a new districting plan must be free both of a discriminatory purpose and of any discriminatory effect. 42 U.S.C. § 1973c; *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4867-70 (1975); *Georgia v. United States*, 411 U.S. 526, 530 (1973). Second, petitioners claim that the Attorney General erred because he imposed on New York the burden of proving that the 1972 lines had neither a discriminatory purpose or effect.⁵ The applicable regulations expressly place this burden on the state, 28 C.F.R. § 51.19, and the Court upheld this burden in *Georgia v. United States*, 411 U.S. 526, 536-41 (1973). The Court of

³ Memorandum of N.A.A.C.P. In Opposition to Approval of Chapters 11, 76, 77 and 78, New York Laws of 1972; Letter of March 21, 1974 to J. Stanley Pottinger from counsel for the N.A.A.C.P.

⁴ Petition 11.

⁵ Petition 11.

Appeals correctly concluded,⁶ and petitioners virtually concede,⁷ that the correctness of the Attorney General's decision cannot be challenged in the instant proceeding.

The 1974 lines to which petitioners object significantly remedied the discriminatory effect of the disapproved 1972 lines. Under the 1974 plan 30% of the Senate districts and 31.4% of the Assembly districts had non-white majorities, compared to 35.1% of the county population,⁸ a substantial increase over the 1972 figures. The number of non-whites living in Senate districts with white majorities was reduced from 574,811 to 169,880, and the number of non-whites living in Assembly districts with white majorities was reduced from 361,707 to 167,632.⁹ The 1974 lines significantly reduced the previous practice of pairing non-white portions of the Bedford-Stuyvesant area with larger white communities far away.

Under the 1974 lines, whites who constitute 64.9% of the county population, are in a majority of 68.6% of the Assembly districts and 70.0% of the Senate districts. Among the officials elected under the 1974 lines, 77.2% of the Assemblymen are white and 80% of the Senators are white. Despite those facts, petitioners assert that this districting plan unfairly discriminates against whites. Petitioners do not claim that whites have been deprived of a meaningful opportunity to participate in the political processes and to elect legislators of their choice. *White v. Regester*, 412 U.S. 755, 766 (1973). Manifestly white voters in the county exercise political power significantly greater than their numbers alone would warrant. Petitioners urge,

⁶ Petition 20a-22a.

⁷ Petition 9, n.3.

⁸ Petition, 27a, n.21.

⁹ See Interim Report of the Joint Committee on Reapportionment, A29, A31.

rather, that in remedying the discriminatory effect of the 1972 lines New York could not consider whether the proposed 1974 lines also discriminated against blacks and Puerto Ricans.

There was manifestly no way the New York legislature could have remedied the discriminatory effect of the 1972 lines without considering the racial composition of possible new districts. Clearly the Attorney General, in passing on new districts submitted by New York, was obligated to consider the racial composition of those districts in order to decide whether they, like the 1972 districts, had a discriminatory effect. It would have been irresponsible for New York to have adopted a series of district plans at random, without regard to their discriminatory effect, until it stumbled across a plan without the forbidden effect. Petitioners do not suggest New York should have done so, nor do they suggest *any* way in which the state could have corrected the defects of the 1972 lines. Petitioners' contentions, if accepted, would mean that, even if the 1972 lines in fact violated section 5 of the Voting Rights Act, New York could not remedy that violation.

The "65 percent quota" to which petitioners object is nothing of the kind. The central defect of the 1972 lines was that they placed most of the non-white voters in districts in which a majority of the eligible voters were white. In assessing whether the new lines had overcome the discriminatory effect of the 1972 lines, it was necessary for New York to determine whether the majority of eligible voters in each proposed district were white. Available census data, however, reveals only the racial composition of the *total* population of each district, not of the *voting age* population. Due to the unusually large number of non-white children in Kings County, a district with 65% non-white total population has a voting age population approx-

imately 50% non-white.¹⁰ Thus the 65 percent standard was used, not to fix a particular quota, but merely to determine if the discrimination found by the Attorney General had been eliminated, i.e., to determine whether disproportionate numbers of non-whites were still in districts in which a majority of eligible voters were white. The city council districts which this Court approved in *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4869 (1975), were at least 64% non-white.

The 1974 district lines did not "guarantee" non-white control of the new districts. The Attorney General, in approving the 1974 lines, rejected the contention that he should require greater non-white majorities, reasoning that the new lines provided a "realistic opportunity for minorities to elect a candidate of their choice,"¹¹ and that they were entitled to no more. In the five new districts where non-whites were for the first time a majority,¹² white candidates won the elections in four.¹³ Nor do the 1974 lines "maximize" non-white representation. It clearly would have been possible to increase the non-white population in many districts and to create additional majority non-white districts, but the Attorney General in approving

¹⁰ In 1970 75.3% of all whites were 18 or over, but only 51.1% of all Puerto Ricans and only 58.2% of all blacks. United States Census, General Social and Economic Characteristics, New York, pp. 615, 644, 661. In addition, due to a defect in the census questionnaire, the population figures used by the New York legislature may have overstated the non-white population by as much as 20%. Memorandum Of Applicants For Intervention in Support of Motions to Dismiss, pp. 26-27; Table 3.

¹¹ Petition, 9a.

¹² The 57th and 59th Assembly Districts, 17th and 23rd Senate Districts, and the 14th Congressional Districts.

¹³ White candidates were elected in all but the 23rd Senate District.

the 1974 lines declined to require this.¹⁴ The 1974 lines do not create a number of majority non-white districts that is excessive compared to the county population; the proportion of Senate and Assembly districts with non-white majorities is significantly lower than the proportion of the county population which is non-white.¹⁵ Compare *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4868-69 (1975).

The core of petitioners' contention is that the Fourteenth and Fifteenth Amendments prohibit the states from deliberately adopting legislation to remedy racial discrimination. Such a construction would render the amendments literally self-defeating, forbidding both discrimination and any remedy therefor. In *City of Richmond v. United States*, 43 U.S.L.W. 4865 (1975), this Court held that, to overcome the potential discriminatory effect of an annexation, the city was obligated to deliberately adopt a "ward system [which] fairly reflects the strength of the Negro community after the annexation," and which would afford non-whites "representation reasonably equivalent to their political strength in the enlarged community". 43 U.S.L.W. at 4868, 4869. *City of Richmond* holds that an affected jurisdiction not only can but must consciously fashion a racially fair districting system to overcome the discriminatory effect of an earlier election scheme disapproved by the Attorney General. The remedy adopted by New York in 1974 was not merely permissible, it was mandatory.

Even before *City of Richmond* this Court recognized that discrimination could not be remedied without considering the racial consequences of the proposed relief. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18

¹⁴ Memorandum of Decision, Nos. V6541-47, pp. 14-18.

¹⁵ *City of Richmond v. United States*, 43 U.S.L.W. 4865, 4868-69 (1975).

(1971) upheld the use of a racially based pupil assignment plan to end the effects of discrimination, on the ground that "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." 402 U.S. 1, 18 (1971). In a companion case the Court held unconstitutional a North Carolina law which prohibited the assignment of students "on account of race," reasoning that such a statute would obstruct the creation of effective remedies. "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971). The lower courts have consistently recognized the need to use racial criterion to remedy racial discrimination.¹⁶

There are, moreover, serious questions as to petitioners' standing to maintain this action. Under the Voting Rights Act the Attorney General's decisions can only be challenged by the State of New York in the District Court for the District of Columbia, not by private parties in other courts. Despite the changes worked by the 1974 lines, the incumbent white Assemblyman who in the past represented petitioners' community was re-elected, and white voters still control more legislative districts than their numbers alone would warrant. The petitioners themselves repeatedly testified that they had no interest in being in a majority

¹⁶ See e.g. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968) (discrimination in urban development); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (discrimination in public housing); *Associated General Contractors v. Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973), cert. denied 416 U.S. 957 (1974) (employment discrimination); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966) (discrimination in the selection of grand jurors).

white district.¹⁷ Although plaintiffs object that their community has been divided between two Assembly districts, the record reveals that this was done to keep as many of them as possible in a heavily white district, a practice of which plaintiffs do not complain.¹⁸ Petitioners' desire to litigate the abstract questions posed by the Petition does not amount to a clear and substantial injury arising from the alleged illegality of which they complain.

The decision of the Court of Appeals below is both correct and consistent with the decisions of this Court and other courts of appeals. This case presents no important questions of law which this Court has not already settled.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, New York 10019

Counsel for Respondents-Intervenors

¹⁷ Transcript of Hearing of June 20, 1974, pp. 41-42, 104-05, 112.

¹⁸ Mr. Seolaro, who drafted the 1974 lines for the Legislature, at first testified that this division was necessary to comply with Assistant Attorney General Pottinger's decision. Petition 12. But on cross-examination he conceded it would have been possible to comply with the Pottinger decision and keep plaintiffs' community intact, and that he had not done so because that could have been accomplished only by placing the community in a district with a substantial non-white majority. Transcript of Hearing of June 20, 1974, pp. 171-75; see Petition 25a.

No. 75-104

Supreme Court, U. S.

FILED

SEP 18 1975

MICHAEL RODALE, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH,
INC., ET AL., PETITIONERS

v.

HUGH L. CAREY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURG,
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v.

HUGH L. CAREY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-50a) is reported at 510 F.2d 512. The opinion of the district court (Pet. App. 53a-58a) is reported at 377 F. Supp. 1164.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5a-6a) was entered on January 6, 1975, and a timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 27, 1975 (Pet. App. 4a). On June 25, 1975, Mr. Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including July 18, 1975 (Pet. App. 1a-2a). The petition was filed on July 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTION PRESENTED

Whether the courts below correctly held that the redistricting law enacted by the State of New York in 1974 for Kings County does not illegally dilute petitioners' voting strength.

STATEMENT

The New York counties of Bronx, Kings and New York are subject to the provisions of the Voting Rights Act of 1965 (the "Act"), as amended, 42 U.S.C. 1973 *et seq.*, by virtue of the Attorney General's determination that on November 1, 1968, the State of New York maintained a test or device (a literacy test) within the meaning of Section 4(c), 42 U.S.C. 1973b(c),¹ and the determination of the Bureau of the Census that less than fifty percent of the voting-age residents of those counties voted in the presidential election of 1968.² Thus, before the State of New York could effect changes in district lines in Bronx, Kings and New York counties, it was required to comply with Section 5 of the Act, 42 U.S.C. 1973c.³

¹See 35 Fed. Reg. 12354 (July 31, 1970).

²See 36 Fed. Reg. 5809 (March 26, 1971).

³The State of New York filed suit for a declaratory judgment on behalf of the affected counties on December 3, 1971, asserting that during the ten years preceding the filing of the suit, the voter qualifications prescribed in the New York laws did not deny or abridge the right to vote of any individual on account of race or color and seeking an exemption from coverage under the Act (Pet. App. 12a-13a). See Section 4(a), 42 U.S.C. 1973b(a). On April 13, 1972, the District Court for the District of Columbia entered a declaratory judgment for plaintiff, with the acquiescence of the United States, thereby relieving the three counties of any obligation to comply with the provisions of

On January 31, 1974, the State submitted the re-districting plans enacted in 1972 for Bronx, Kings and New York counties to the Attorney General for review under Section 5 of the Act. The Attorney General objected to certain provisions of those plans on April 1, 1974, advising the New York Attorney General's office (Pet. 3):

On the basis of all the available demographic facts and comments received on these submissions as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of the race or color, we have concluded that the proscribed effect may exist in parts of the plans in Kings and New York Counties.

The letter of objection stated that the provisions contained in the plans for election to the state senate and assembly from Kings County failed to comply with Section 5 because one of the districts provided for in the plans had an "abnormally high minority concentration while adjoining minority neighborhoods [were] significantly diffused into surrounding districts, * * * [and we know]

the Voting Rights Act (Pet. App. 13a). *New York State v. United States*, Civil No. 2419-71 (unreported).

Subsequently, as a result of the decision of the District Court for the Southern District of New York in *Torres v. Sachs*, 73 Civ. 3921 (September 26, 1973) (unreported), which held that the conduct of elections in the City of New York solely in the English language violated the rights of non-English speaking Puerto Rican citizens, the United States moved in the District Court for the District of Columbia to reopen the declaratory judgment of April 13, 1972. On November 5, 1973, the motion to reopen was granted, and on January 10, 1974, the declaratory judgment was rescinded. On April 30, 1974, the State's motion for summary judgment was denied. This Court summarily affirmed the 1974 orders. *New York on behalf of New York County v. United States*, 419 U.S. 888. (See Pet App. 13a.)

of no necessity for such configuration and believe * * * other rational alternatives exist" (Pet. 3-4).⁴ Under Section 5 of the Act, 42 U.S.C. 1973c, the State of New York could have brought an action before a three-judge court in the District of Columbia challenging the basis of the Attorney General's objections: See *Allen v. State Board of Elections*, 393 U.S. 544. However, no such action was brought.

Following receipt of the Attorney General's objections, the State revised those portions of the 1972 redistricting plans to which the Attorney General had objected—including those provisions contained in the plans for elections to the state senate and assembly from King's County, which are the subject of this litigation. Laws of New York, chs. 588-591, 599 (1974). Petitioners, who purport to represent the Hasidic community of the Williamsburgh area of Brooklyn (Kings County), brought this suit on June 11, 1974, seeking to enjoin implementation of those provisions in the 1974 redistricting plans relating to state senate and assembly elections from Kings County. They alleged that the disputed provisions in the Kings County redistricting plans violated their rights under the Fourteenth and Fifteenth Amendments by dividing their community between two senate and assembly districts. They further alleged that they had been assigned to districts solely on the basis of race, in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Petitioners also

⁴The Attorney General also objected to certain provisions for congressional redistricting in Kings County and to portions of the redistricting plans for New York County. Since petitioners presently seek relief only with respect to the state senate and assembly redistricting plans for Kings County, however, those additional redistricting provisions are not at issue here.

sought a declaration that in objecting to portions of the 1972 redistricting plans, the Attorney General had applied impermissible standards. On July 1, 1974, the Attorney General entered his decision not to object to the 1974 redistricting plans (Pet. App. 6-7, and n. 2).

The district court dismissed the suit on July 25, 1974, holding that once the Attorney General had informed the State of New York that he would not object to implementation of the 1974 redistricting provisions challenged by petitioners, no controversy remained under Section 5 of the Voting Rights Act and that petitioners' constitutional challenges were without merit. The court stated that petitioners enjoyed no constitutional right to separate community recognition, that state officials may take into account the racial impact of alternative redistricting schemes in an effort to correct past racial discrimination and that "no one is being disenfranchised by the redistricting [at issue here] and no voting right is being extinguished" (Pet. App. 58a).

The court of appeals affirmed, holding that the complaint against the Attorney General must be dismissed because the district court was without jurisdiction to review the Attorney General's objections to the 1972 plans and no relief was sought against the Attorney General except a declaration that he had applied impermissible standards in objecting to those plans (Pet. App. 20a-22a). As to the state defendants, the court of appeals held that petitioners had failed to prove that their constitutional rights had been violated (*id.* at 22a-24a). As Hasidic Jews, petitioners presented no cognizable claim to remain together as a voting bloc. The court held (*id.* at 24a-26a) that petitioners did have standing to contend, as white voters, that racial considerations cannot be used in drawing district lines. The court concluded (*id.* at 27a-28a), however, that petitioners had failed to show that the effect of the

disputed 1974 redistricting provisions was to reduce the voting strength of white voters in Kings County as a whole or even in the particular districts in which petitioners resided.

ARGUMENT

1. The court of appeals was correct in dismissing the Attorney General of the United States as a party to this case. Indeed, petitioners do not challenge the dismissal. Jurisdiction to review the Attorney General's objections to the 1972 redistricting plans is vested exclusively in the District Court for the District of Columbia under Section 5 of the Act, 42 U.S.C. 1973c, and then only at the behest of the State of New York or a political subdivision. *Allen v. State Board of Elections*, 393 U.S. 544, 555, 561. Once the Attorney General had decided not to object to implementation of the disputed 1974 redistricting provisions, moreover, the requirements of the Voting Rights Act were satisfied, and the courts below were foreclosed from determining whether the Attorney General had correctly determined under the Act that the redistricting did not have the purpose or effect of denying or abridging the right to vote on account of race or color. *Perkins v. Matthews*, 400 U.S. 379, 386.

2. Contrary to petitioners' contention (Pet. 2), this case does not present the question—

[w]hether such a gerrymander [the disputed 1974 redistricting provisions] was rendered constitutional by the fact that it was carried out under the instructions of the United States Department of Justice, purporting to implement the Voting Rights Act of 1965.

In objecting to the 1972 redistricting plans, the Attorney General determined that certain of the provisions contained therein would have had the effect of abridging the right to vote on account of race or

color. He did not suggest alternative provisions or plans, and the 1974 lines were not drawn at his direction or pursuant to his instructions.⁵ If the State of New York had not enacted in 1974 redistricting provisions not objected to under Section 5 of the Voting Rights Act, the districting provisions in effect prior to 1972 would have remained in effect. As the Attorney General noted in his memorandum of July 1, 1974 (Pet. App. 36a-37a):

In assessing these arguments [against the provisions of the 1974 plans challenged by petitioners], two basic principles should be kept in mind. First, it is not the function or authority of the Attorney General under Section 5 to devise redistricting plans, or for that matter to dictate to the State of New York specific actions, steps or lines with respect to its own redistricting plan. The only function of the Attorney General under Section 5 is to evaluate a voting change, such as that encompassed in the instant submission, once it has been adopted by the state and submitted for the Attorney General's review, and to determine the limited question of whether the purpose or effect of the change in question is to deny or abridge the right to vote

⁵Richard S. Scolaro, Executive Director of the State's Joint Legislative Committee on Reapportionment, testified that from discussions with Department of Justice personnel he "got the feeling * * * that 65 percent would be probably an approved figure [for the percentage of non-white population in the assembly district which, under the 1972 plans, was 61.5 percent non-white]" (Pet. 5). Scolaro also testified, however, that no specific figure was either suggested or explicitly approved by the Department of Justice prior to the State's second formal submission (Pet. App. 16a), and there is no testimony that Department of Justice personnel suggested that any particular geographic lines be drawn within Kings County.

on account of race or color. If no such abridgment or denial exists, the Attorney General must not object to the plan, regardless of the merits or demerits of the plan in other regards, including state, local, and partisan political ones. If an abridgment or denial does exist—as we found in the first submission by New York—the Attorney General must object, stating his reasons, but not drawing a counter plan or commanding any particular state response.

Although the court of appeals correctly stated that the 1974 redistricting was in conformity with the “unchallenged directive” of the Attorney General and with his “approval” (Pet. App. 31a-32a), the “unchallenged directive” was the Attorney General’s determination (unchallenged by the State of New York in a declaratory judgment action before a three-judge court, as provided for in Section 5) that certain provisions of the 1972 redistricting could not be enforced and the “approval” was the Attorney General’s *post hoc* decision not to object to the redistricting provisions enacted in 1974. The Attorney General did not instruct the State to revise any of the district lines in effect prior to 1972 or, in effecting changes, to adopt any particular new plan or plans with prescribed characteristics. In entering no objection to the 1974 plans, he merely found the plans not to be in violation of the Voting Rights Act.

3. The court of appeals correctly held that petitioners, as Hasidic Jews, do not enjoy a constitutional right to separate community recognition in legislative districting. No court can give effect to each of the community interests that thrive in Kings County.⁶ See *Wells v.*

⁶As the court of appeals noted (Pet. App. 23a), there are from twenty to sixty clearly defined communities in Kings County. In view of the fact that there are fewer than nine senate districts and twenty-two assembly districts in the county, it would be impossible to give effect to each community interest.

Rockefeller, 281 F. Supp. 821, 825 (S.D. N.Y.), reversed on other grounds, 394 U.S. 542. Petitioners have not claimed, moreover, that the purpose of the 1974 redistricting was to dilute or abridge their right to vote as Hasidic Jews. As noted by the court of appeals (Pet. App. 24a):

Rather their complaint is that the purpose [of the 1974 redistricting] was to ensure nonwhite majority representation in the districts in question. Their argument that this purpose was unconstitutional is unchanged whether the *Hasidim* were included in one district or two.

Petitioners also failed to show that their constitutional rights as white voters had been abridged. As the court of appeals noted (Pet. App. 27a-28a, n. 21), the population of Kings County is 64.9 percent white and 35.1 percent non-white (*i.e.*, black and Puerto Rican). Under the disputed redistricting provisions enacted in 1974, three of King County’s ten senate districts contain non-white population majorities. Thus, white voters have voting majorities in 70 percent of the senatorial districts—a figure slightly greater than their numbers represent in the county as a whole. Similarly, only seven of the county’s twenty-two assembly districts contain non-white population majorities under the 1974 redistricting provisions. The other fifteen districts (68 percent of the total number of districts) contain white population majorities.

Thus, petitioners have not only failed to show that the 1974 redistricting was “conceived or operated as a pur-

poseful device to further racial discrimination,"⁷ *Whitcomb v. Chavis*, 403 U.S. 124, 149, but they have also failed to prove that the effect of the 1974 redistricting is to dilute their voting strength as white voters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1975.

⁷In contending that the districts provided for in 1974 for elections to the state senate and assembly in Kings County are invalid because they were drawn along racial lines, petitioners fail to recognize that the State of New York was required by the Voting Rights Act to prove the absence of a racially discriminatory effect prior to implementing any changes in the existing lines. Thus, the state defendants could not close their eyes to race. Such race consciousness, however, is not equivalent to invidious racial discrimination. See *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46.

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,
Petitioners.

v.

HUGH L. CAREY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. We note, initially, that the principal respondents have filed no response to our petition seeking review of the decision of the court of appeals in this case. The State of New York and the City of New York, represented by the Attorney General of the State and by the Corporation Counsel of the City, have deliberately chosen not to oppose the granting of the petition.¹ We recognize, of course, that the par-

¹ In telephone conversations with counsel (George L. Zuckerman, Esq., and Erwin Herzog, Esq.,) petitioners' counsel has learned that the failure to file any response in this Court was due to a deliberate policy decision made by the appropriate officials of the governmental agencies involved.

ties cannot impose a case on this Court by consent. However, the failure to oppose the granting of certiorari indicates that these respondents recognize that the case presents important questions that warrant consideration and decision here.

2. The Solicitor General's brief in opposition principally disclaims responsibility on the part of the United States for the "quota" apportionment made in this case by State law. It is argued that the Civil Rights Division did not expressly direct a 65 percent non-white quota, but that it merely "evaluated" the 1972 and 1974 redistricting plans. The government cannot deny, however, the undisputed testimony that the 65 percent quota grew out of substantial discussions of an informal nature between the Department of Justice and officials of New York State. No explicit directive was necessary in these circumstances, and the informal "jawboning" technique shown by the record presents equally serious questions of constitutionality as would a formal order. These arise whether or not the Attorney General is a necessary party. If the Civil Rights Division would not have approved a 1974 plan with a figure of less than 65 percent, it cannot avoid responsibility for that judgment by now asserting that the Attorney General need not have been joined as a party to this suit.

3. The Solicitor General's brief first responds to a claim *not* made by petitioners (*i.e.*, that they are entitled as Hasidic Jews, to "separate community recognition in legislative districting").² It then makes only one argument

² Although our constitutional argument does not depend on the existence of a Hasidic community (and a showing that it has now been fragmented), we believe that the effect on the community does demonstrate the personal injury caused to the plaintiffs by the racial gerrymander. In other words, a white voter who is not a member of any particular homogeneous community may be thought to have suffered

(continued)

on the merits to sustain the decision below. The government's brief asserts that since Kings County is approximately 65 percent white, the fact that white voters have a voting majority in 70 percent of the Senatorial districts and 68 percent of the Assembly districts demonstrates that the constitutional rights of white voters have not been abridged. This argument is demonstrably erroneous. The white voters of a particular district or districts who are the victims of a deliberate racial gerrymander can hardly be satisfied by a showing that *other* districts in the county are receiving their constitutional rights. Would it be a defense to deliberate school segregation in one neighborhood school district to establish that there are other neighboring school districts where no racial segregation is practiced or that, on a county-wide basis, the over-all figures show substantial integration?

4. The intervenors' brief asserts, as fact, allegations that were made in the intervenors' Memorandum to the Department of Justice with regard to the 1972 reapportionment.³ These allegations were *not* accepted or approved by the Attorney General in his conclusions regarding that reapportionment. In fact, the Attorney General found only that New York had failed to meet the burden shifted to it

² (continued)

minimal injury if he is in one district rather than another (where he would be if no racial selection were at work). A white voter who is a member of a particular community of white voters suffers a more direct and legally cognizable injury if he is separated from the remainder of that community by a racial gerrymander. The nature of the community involved in this case is graphically described — in words and pictures — in a recent article that appeared in *The National Geographic* of August 1975. We append a reprint of that article to this brief to acquaint the Court — more effectively than lawyer's words can — with the Hasidic Community of Williamsburgh.

³ The Memorandum is cited at page 4, note 3 of the intervenors' brief as the sole authority for the factual propositions stated on page 3 and the top of page 4 of that brief.

under the governing regulations. The record is undisputed that New York's failure to seek judicial review of even this determination was attributable to the shortage of time before the next election.

5. The intervenors also argue that the 65 percent quota was not a 65 percent quota at all but, given "the unusually large number of non-white children in Kings County" (a factual assertion which also finds no support in this record), it is really a 50 percent quota (Intervenors' Brief, pp. 6-7). Of course, our challenge to the imposition of a racial quota applies whether the quota is 50 percent, 65 percent, or 90 percent.

Nor is the unconstitutionality cured even if — as the intervenors assert in this Court (again without any formal proof in the record) — white representatives were elected in 1974 in some districts where a 65 percent quota was applied. It is ironic, to say the least, that the intervenors cite the failure of their own unconstitutional scheme as proof of its validity. Non-white voters in the affected districts may have been sensible enough to have rejected the call to racism upon which the intervenors' position is based. But the intervenors have consistently admitted that the goal of their "quota" was to secure the election of a "black or Puerto Rican candidate" in each of the districts.

Moreover, if the effort made on this record is sustained, there is every reason to expect that, in future cases, the failure of black or Puerto Rican candidates to be elected will be used as proof that a 65 percent quota is too low, and that it must henceforth be raised to 70, 75 or even 80 percent to ensure the election of black or Puerto Rican candidates.

6. Neither of the briefs filed in opposition in this Court challenges the view that the issues presented here are substantially related to those being considered by the Court in *Beer v. United States*, No. 73-1869, which has been set for

reargument this Term. Indeed, the intervenors relied on the *Beer* case in the courts below, and called this Court's actions regarding *Beer* to the attention of the courts while the matter was *sub judice*.

For the foregoing reasons, and those stated in our original petition and in the *amicus curiae* brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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MAYBE we should have parachuted
in. That would have seemed much
more appropriate somehow for two
travelers dropping out of one
world into another. Instead, mun-
danelly, photographer Nathan Benn and I
took the subway, boarding on Manhattan's
lower East Side and emerging ten minutes
later into a setting that looked for all the
world as if some errant stagehands had mixed

the scenery for two different plays—one
about a decaying tenement neighborhood in
today's Brooklyn, the other about a pre-World
War II rural Jewish village, or *shtetl*, of
eastern Europe.

"Welcome to Williamsburg in Brooklyn,"
Nathan said. "Or to Satmar in old Hungary.
It depends on how you look at it."

Passing shopwindows hieroglyphed with
square-block Hebrew letters, we entered the

The Pious Ones

By
HARVEY ARDEN

NATIONAL GEOGRAPHIC STAFF

Photographs by
NATHAN BENN

Absorbed in prayer, an
ultra-orthodox Hasidic Jew
wraps himself in a prayer
shawl while communing with
God in a small synagogue
in Brooklyn. He sustains an
extraordinary way of life that
the Hasidim—"pious ones"—
zealously pursue in the midst
of America's largest city.

BEST COPY AVAILABLE

extraordinary world of Williamsburg's Hasidic Jews, or Hasidim—meaning “pious ones.” Here, wedged amid Brooklyn's ethnic hodgepodge, sprawls a 40-block enclave of ultra-orthodox Judaism, where most of the men wear flowing beards and dangling earlocks in accordance with God's command in the Book of Leviticus 19:27: “Ye shall not round the corners of your heads, neither shalt thou mar the corners of thy beard.”

Their clothing, derived from styles long worn by Jews in eastern Europe, is a striking study in monotone—black or dark-toned suit, wide-brimmed black hat, white shirt buttoned at the neck, no tie. “It may seem plain to you,” one Hasid told me, “but to me it's beautiful!” On Sabbaths and holidays the married men don great sable-trimmed hats called *shtreimels*, giving them a noble, almost regal air as they stride along.





The women, not limited to their menfolk's color scheme, wear modish but distinctly modest garments as they push their baby carriages and strollers along Lee Avenue (page 295). Only after you've been told are you likely to notice that most of them are wearing wigs. Often styled in the latest coiffure, these are worn to conceal their real hair—which is cropped after their wedding and henceforth hidden from men's eyes as prescribed by a centuries-old tradition.

Here, a single subway stop from Manhattan, children learn Yiddish as their native tongue, and rarely if ever see a television show or movie, or read a novel. Nor for that matter are they likely to drift into delinquency, experiment with drugs, or rebel against the value system of their elders.

For here the *mitzvahs*, or commandments, which God on Mount Sinai charged His chosen people to obey, are honored as rules of living with a devotion so vibrant that the tablets of the law might have been carried down by Moses to Lee Avenue this very morning.

To these Brooklyn streets after World War II came several thousand Hasidim, remnants of a widespread movement within Judaism that flourished in eastern Europe from the mid-1700's until—but only until—the Nazi catastrophe. The survivors arrived in America and Palestine with blue concentration camp numbers tattooed on their forearms and the searing horror of Hitler's death camps branded on their souls.

HOPING TO GET A GLIMPSE of the famed Hasidic *tzaddik*, or spiritual leader—the Satmar Rebbe, Yoel Teitelbaum—Nathan and I hurried to reach the Satmar *bes medresh*, or house of study and prayer, before sunset. Already a fireball sun had tangled itself in the cables of the nearby Williamsburg Bridge. Before us stretched an almost surreal perspective of venerable Brooklyn brownstones, their storefronts already shuttered against the gathering blue dusk of this fast-approaching Rosh Hashanah, the Jewish New Year.

"A few minutes more on the subway and we'd already have broken the law," Nathan said. "The *Jewish* law, that is, against traveling or working on a Sabbath or religious holiday. For an Orthodox Jew to ride a subway or even to push the buttons on an elevator is forbidden. And put on your yarmulke, too." He referred to the (Continued on page 284)

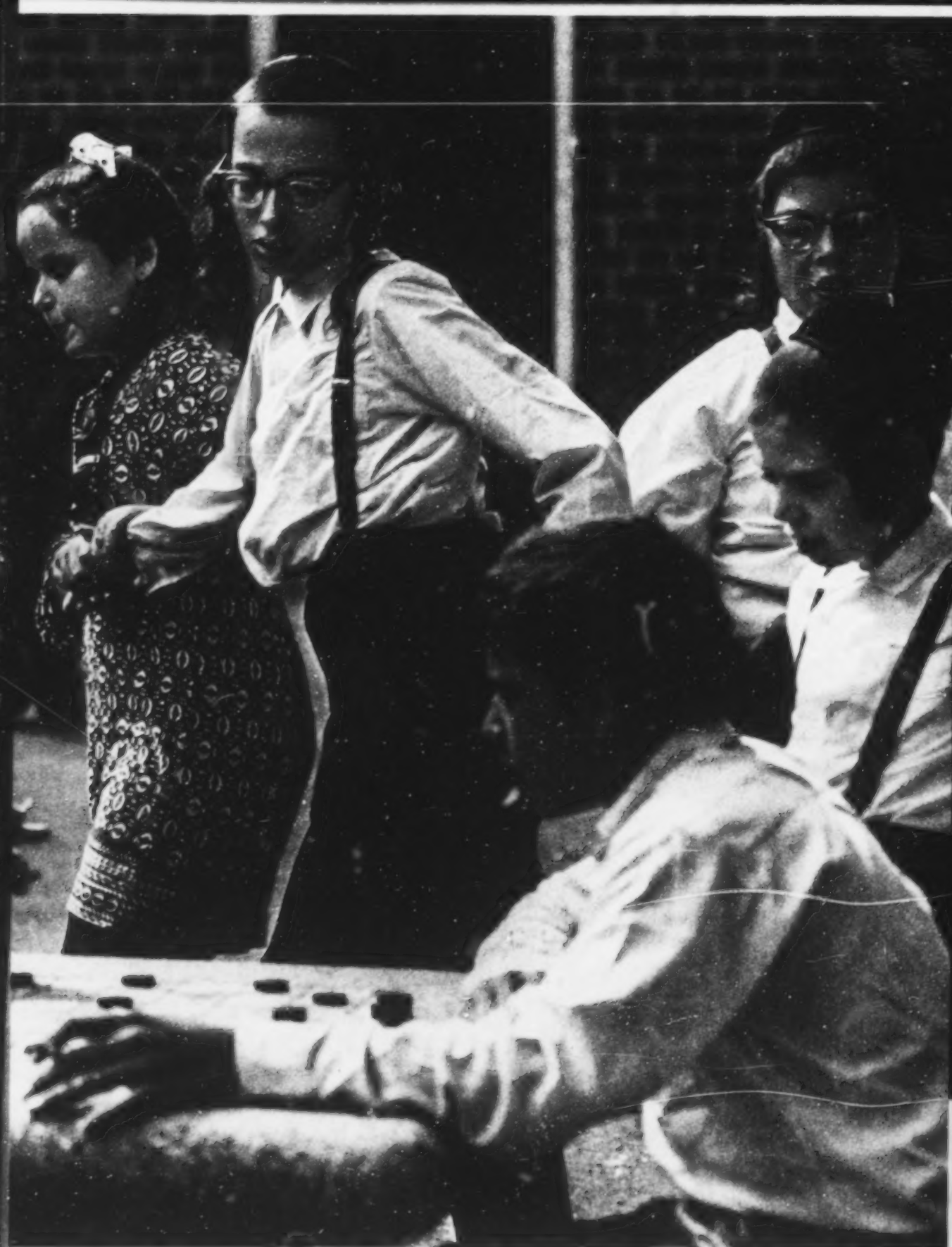


"... I have been a stranger
in a strange land." EXODUS 2:22

Outpost in the Diaspora, Brooklyn's Williamsburg neighborhood (facing page), just across the East River from Manhattan, became a refuge after World War II for thousands of east European Hasidic Jews—survivors of the Nazi holocaust. Transplanted to America, the scorched but still living tree of Hasidic faith blooms anew in Brooklyn. Down streets where Yiddish is heard more often than English, a Hasid (above) hurries along to begin another day dedicated to the service of God.



"Take heed unto yourselves, lest ye forget the covenant of the Lord your God. . . ." DEUTERONOMY 4:23



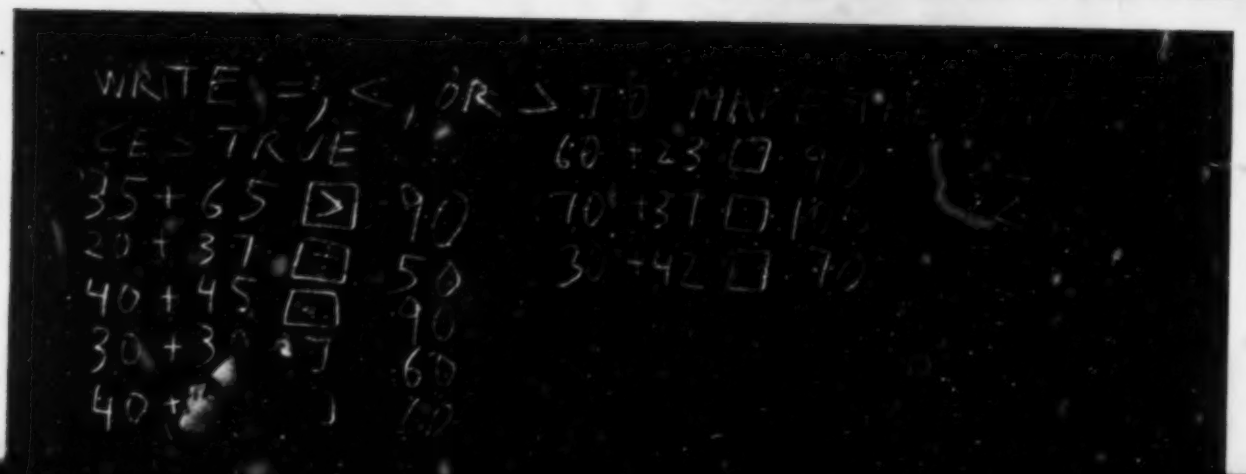
Her brother's keeper, a Hasidic girl pulls a sibling from the lures of the profane world. Distractions such as movies, television—even watching "outsiders" at checkers—are shunned by most Hasidim,

whose lives pivot on strict observance of Orthodox Jewish law and ritual. Males wear earlocks to fulfill God's command: "Ye shall not round the corners of your heads. . . ." (LEVITICUS 19:27)



"Behold, I have taught you statutes and judgments. . . . teach them thy sons. . . ." DEUTERONOMY 4:5, 9

Learning God's wisdom—and a bit of man's—students at a Hasidic *yeshivah*, or academy (above), spend most of a dawn-till-dusk study day poring over the huge tomes of the Talmud, the vast exposition on Jewish law and custom. Conforming to New York State requirements, Hasidic youths also learn a modicum of "English"—meaning not only the English language, which many first learn at school, but also such subjects as math (right) and social studies.



skullcap traditionally worn by Jews. "The Hasidim wear them all the time—even when they're sleeping."

I later inquired of a Hasidic acquaintance why he wore his yarmulke even when he went to bed.

"Because a Jew covers his head as a sign of his respect for God," he answered. "And—tell me, please—am I not still a Jew when I'm sleeping?"

From the pocket of my coat I extracted a black skullcap and stopped before a shop-window to position it on my head. At that moment a Hasidic lad, a beardless copy of his dark-clad elders, came to a sudden halt in front of me, eyebrows raised.

"You should be ashamed!" he admonished, his earlocks quivering. "Do you mean that you put on your yarmulke only after you've gotten here? Are you a Jew only when you're in Williamsburg?" Eyes flashing darkly, he hurried off down Lee Avenue. I shrugged with a sense of utter helplessness. It would not be the last time that the admittedly unorthodox quality of my own Jewishness would be brought into open question by zealously observant Hasidim.

Though I had become bar mitzvah—a "son of the commandment" or a "man of duty"—at age 13, I had only occasionally attended a synagogue since then. Certainly I had no sense of obligation to follow all of the multitude of mitzvahs, or commandments, that God had charged the Jews of Moses' time to obey in fulfillment of their covenant with Him. To the Hasidim, however, these mitzvahs are as important today as they were in ancient times.

No fewer than 613 such mitzvahs are enunciated in the five books of Moses comprising the Torah, or Pentateuch. They range from the Ten Commandments and such sublime moral precepts as "thou shalt love thy neighbor as thyself" to so technical a regulation as "neither shall a garment mingled of linen and woollen come upon thee."

These latter two mitzvahs, seemingly worlds apart in significance, appear in consecutive verses of the Book of Leviticus (19: 18, 19). The Hasidim hew as strictly to the latter as to the former. To heed and safeguard the 613 mitzvahs, plus literally thousands of other laws and traditions that have evolved from them over the millenniums, becomes the very fulcrum of their daily existence.

REACHING the Satmar bes medresh, Nathan and I elbowed our way through a dense crowd of Hasidim toward a large inner doorway. Squeezing up as far as we could, we stood on tiptoe and peered into the main prayer hall, a great room into which, I later learned, some seven thousand people had been packed. All were utterly absorbed in prayer, faces adrip with mingled sweat and tears of ecstasy, lips murmuring impassioned prayers at a furious pace, bodies rocking and swaying and trembling with emotion—turning that huge prayer hall into an echo chamber of the spirit reverberating with passion for God.

The Satmar Rebbe himself, leading the prayers at the front of the room, was completely blocked from our view by adoring crowds of Hasidim. A Hasid later explained to me why he tries to get physically near the

Rebbe: "The Rebbe's soul," he said, "is closer to God than other men's. We get as near to him as we can so that our prayers will be carried up to heaven with his, like sparks rising up with a great flame."

Not until my next visit to Williamsburg did I actually get a clear view of the Rebbe. This was at the annual celebration of his escape from the Nazis, an observance combined with a fund raising for the Satmar parochial school system, which serves thousands of Hasidic children.

Once again I found myself in the midst of a great crowd of Hasidim. All were amurmur with expectation of the Satmar Rebbe's arrival. A sudden commotion erupted around a side entrance of the hotel ballroom where the celebration was being held. All eyes turned in that direction.

Preceded by aides, who created an aisle for him through the vast throng, the Rebbe himself now entered—a slender patriarch with flowing white earlocks and a graceful tuft of white beard curled on his black-suited breast like new-spun silk. His face, untouched by the pandemonium around him, radiated an almost visible glow of spirituality that seemed to be reflected in the faces of his disciples.


At the sight of the revered tzaddik, the entire congregation rose to its feet in a single body and exploded into a rhythmic wall-rattling chant, which crescendoed until it seemed the room could contain not another decibel. At this point the Rebbe, with the slightest batonlike motion of one index finger, brought the runaway chorus of thousands to an instantaneous halt. Even the echoes seemed to die at once.

Now, through the loudspeakers, came the Rebbe's voice—the merest pin-scratch on a slate of silence. Yet that parchment-thin, otherworldly voice was instantly compelling. His disciples, many rocking and swaying as if in prayer, hung on each word as he thanked God for liberating him from the Nazis and for enabling him to be here with his beloved Hasidim. He spoke of the crucial importance of educating their children in Hasidic schools and reminded them that charity, which made such education possible, was one of the noblest of virtues. He then sat back, a benign expression lighting his face, and allowed his aides to take over the fund-raising activities (following pages).


THERE WAS A TIME, before a stroke weakened him some years back, when the Rebbe—now approaching 90—would have discoursed at greater length. His disciples recall how, on the Festival of Simchas Torah—"Rejoicing in the Torah"—he would dance for hours through the night with the holy Torah scroll cradled in his arms.

"He's as famed for his scholarship as for his saintliness," one Hasid told me. "Once, when I was a boy, I climbed a tree outside his window to see if it was true he often studied all night long. Well, there he was, in the middle of the night, bent over a volume of the Talmud, his finger at his temple, studying. A true saint he is!"

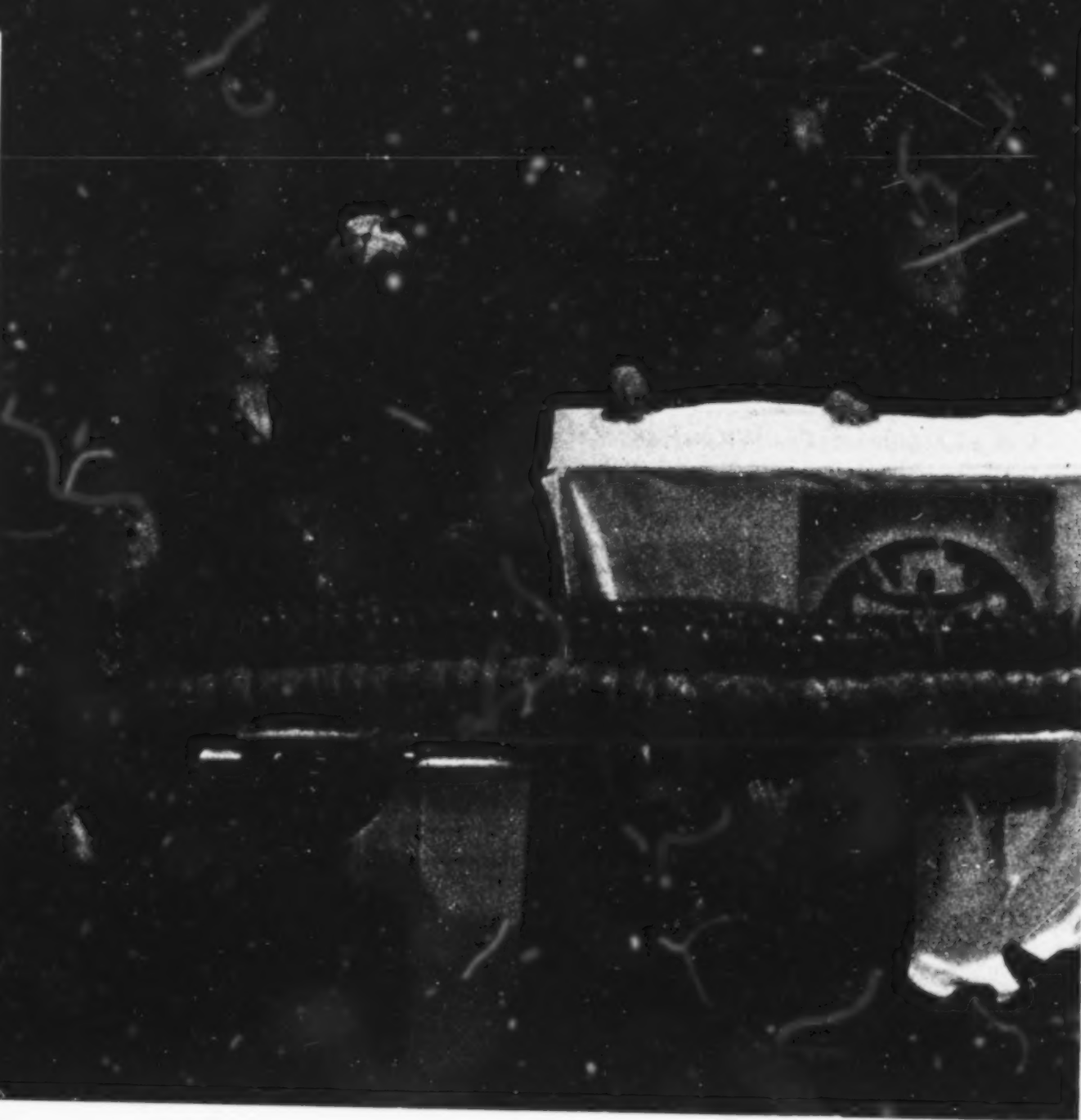
If the adulation of his devotees seems somewhat extreme to the outsider, one must understand the pivotal importance of this charismatic man in both their private lives and their collective history.



"Thou shalt not. . . ." A glinting tear of remorse burns the cheek of a Hasidic youngster being admonished for some transgression by fellow students in the hallway of a *cheder*, or school for young boys. Such mutual chiding among peers discourages nonconformism and helps to bring about a strict adherence to the dos and don'ts in the prodigiously complex Hasidic code of behavior.



But on Purim it's OK. Two Hasidic lads step out of the rain to light up a smoke during the holiday of Purim. On this traditional day of merry-making, good-natured mischief reigns. Youngsters puff cigarettes and don costumes, while their elders—winking at usual restraints against excessive alcoholic consumption—down frequent glassfuls of wine or slivovitz, a fiery plum brandy.

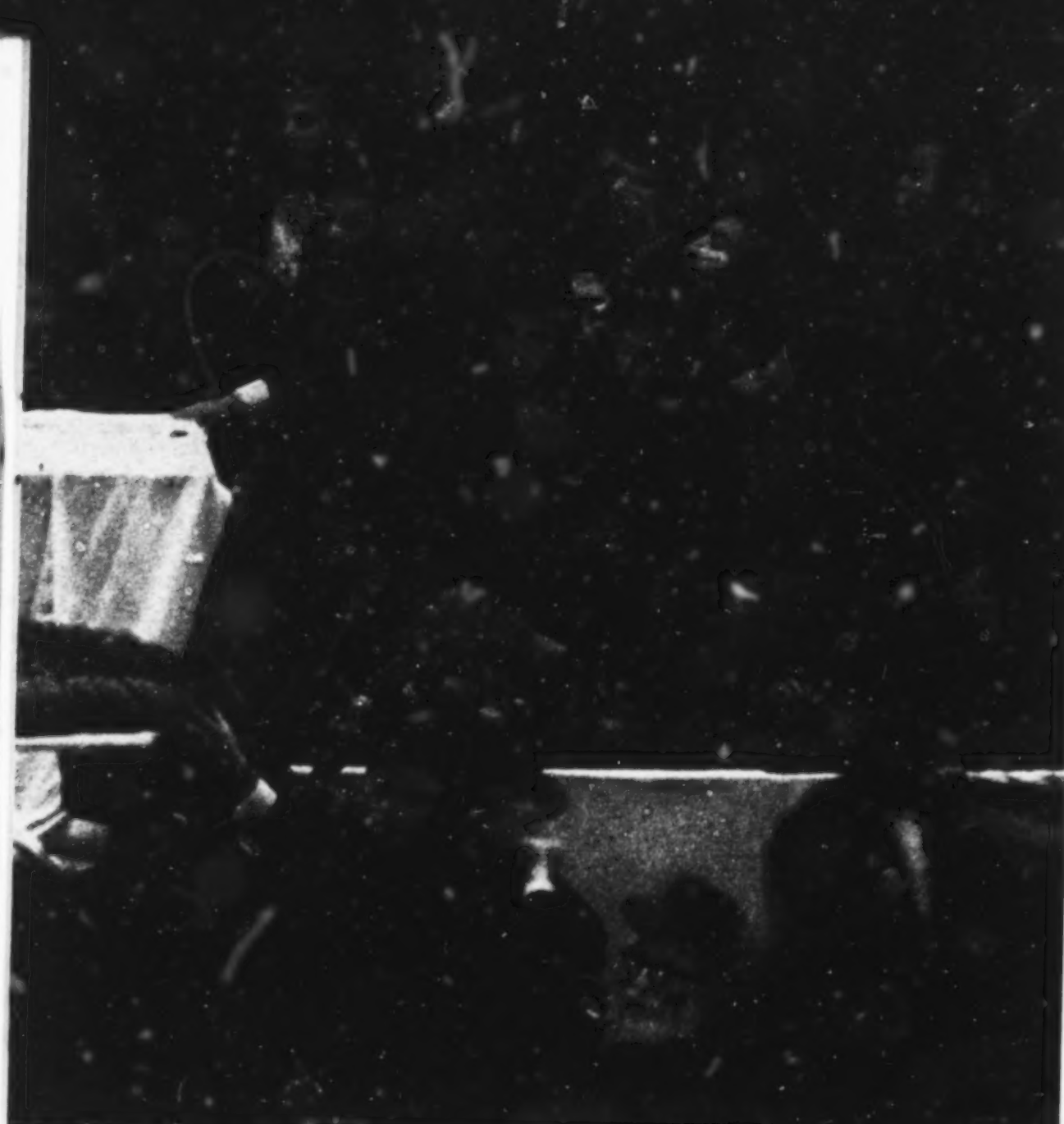


The master and his disciples: At a yearly celebration of his 1944 escape from the Nazis, the white-bearded Satmar Rebbe, Yoel Teitelbaum (**above**, seated), gathers with some of his many thousands of followers. Renowned for his saintly ways and intellectual brilliance as well as for his militant anti-Zionism, the Rebbe is the guiding light of both religious and secular affairs among the Satmar Hasidim.

The enormous braided loaf of bread, or *challah*, on the table before him will be

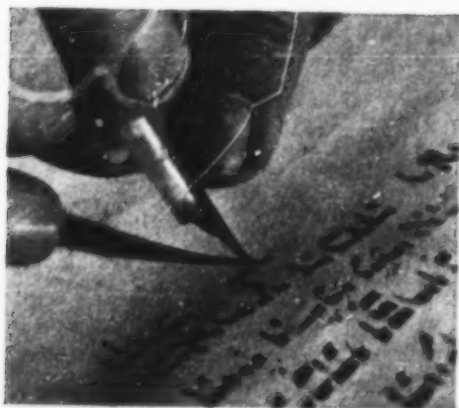
divided and eagerly shared by hundreds of Hasidim—the merest crumb from the master's table being passionately sought after.

Feet and souls equally animated (**right**), a group of Hasidim at a wedding celebration dance and chant for hours on end in an ever-mounting outpouring of spiritual joy and devotion. The Baal Shem Tov, a mystic who founded Hasidism in eastern Europe in the mid-1700's, imbued his followers with just such a sense of joyful worship and ecstatic love of God.



ROY MORSCH, NEW YORK DAILY NEWS (ABOVE)





"And I have filled him with the spirit of God . . . in all manner of workmanship." EXODUS 31:3

"One chases after a living when not chasing after God," a Hasid told the author. A cutter and polisher in Manhattan's diamond district (above) brings much-needed cash into Brooklyn's Hasidic enclave. Many work at jobs created by the community's special religious requirements. Deft fingers of a ritual scribe (left) keep busy lettering Torahs—the first five books of the Bible—and various religious articles.

Long before World War II he was already a famed tzaddik in eastern Hungary, becoming spiritual leader of a Hasidic community centered in the town of Satmar—today a part of Romania, and spelled Satu Mare. This region came under the Nazi jackboot late in the war, by which time the vast majority of eastern Europe's Hasidim—perhaps 500,000 or more, no one knows even roughly how many—had been systematically annihilated with millions of other Jews. Then, in 1944, the Satmar Rebbe and his followers, along with most of the rest of Hungarian Jewry, were dispatched to death camps.

Even in that living hell he and his Hasidim strove to fulfill what mitzvahs they could. One of the first cruelties inflicted by the Nazis was the shearing off of their beards and earlocks. The Rebbe, it is told, pretended to have a toothache and concealed both beard and earlocks beneath a large bandage. Miraculously, the Nazis took no notice.

The bribing of Nazi officials enabled a trainload of Jews, including the Satmar Rebbe, to escape to Switzerland. Soon after, the Rebbe went to Jerusalem. There, however, his ideas failed to jibe with those of the Zionists who were working to set up the yet-unborn State of Israel. The government of the Promised Land, the Rebbe adamantly insisted, must be founded not by men but by the Messiah himself. To this day he declares that the present State of Israel usurps the soil of Zion and actually delays the coming of the Messiah.

Such a militantly anti-Zionist attitude—not shared by all groups of Hasidim—has raised the blood pressure of many Israelis and pro-Zionist American Jews.

LEAVING JERUSALEM in 1946, the Satmar Rebbe came to the Williamsburg neighborhood of Brooklyn, already a bastion of American Orthodox Jewry that had become a haven for displaced European Jews after the war. Though many of Williamsburg's newly arrived Hasidim had not been the Rebbe's immediate disciples before the war, they found in his presence a spiritual magnetism that could pull together the shattered pieces of their lives.

"When we arrived," one Hasid told me, "we had nothing. We were dazed, hopeless, without any direction or center in our lives. The Satmar Rebbe, may he be forever blessed, gave us that direction, gave us a center.

He instilled in us a new hope and restored our belief in the world—and in ourselves."

Starting from scratch, the Rebbe laid the foundations of a new Satmar Hasidic community; its membership today numbers in the tens of thousands. Other Hasidic rebbes, too, settled in Williamsburg and nearby Brooklyn neighborhoods—most notably the Lubavitcher Rebbe, whose following in Crown Heights has attracted thousands of American Jews. These Brooklyn communities and the various groups in Israel comprise the largest concentrations of Hasidim in the world.

Transplanted to America, a new tree of faith began growing—and blooming—in the streets of Brooklyn.

I once asked my Satmar friend Moishe Green: "Who will take the Rebbe's place when, God forbid, he leaves this world?"

He answered: "We don't think about it. Only the Messiah himself can replace so great a tzaddik as the Rebbe. My own belief is that, before the Rebbe leaves us, the Messiah will come to Brooklyn and lead us home to the Promised Land."

SUCH DEEP-SEATED BELIEF in the redeeming powers of Hasidic rebbes traces back to the 18th century to the founding father of Hasidism, Israel Baal Shem Tov, one of the most extraordinary and luminous figures in the millenniums-long history of Judaism. A poor and unpretentious man, a native of the Carpathian Mountain region, he brought to the poverty-wracked, pogrom-plagued Jewish masses of Poland and the Ukraine a spiritual message of transcendent joy and hope.

Inveighing powerfully against the often-arid emphasis on religious scholarship that had come to dominate Jewish spiritual life in his time, he proclaimed that even the most unlearned Jew could experience a direct communion with God through ecstatic worship and a truly joyful keeping of the mitzvahs. What mattered was not so much the loftiness of one's intellect as the purity of one's soul, however humble. Love of God, he taught, could be expressed as well through spontaneous singing and dancing as through formal prayer and scholarship.

For a time this passionately mystic approach to religious life aroused the bitterest opposition of the Orthodox establishment. Some of the early Hasidim were excommunicated. Yet the movement spread like holy

"... the Lord shall give you ...
flesh to eat, and ... bread
to the full." EXODUS 16:8



Consecrating each act, Hasidim see the table as a kind of altar, and the food served thereon as a form of offering. A *shochet*, or ritual slaughterer (above), dispatches chickens with one painless flick of his razor-sharp blade, as prescribed by Jewish dietary laws. At the table a Hasid intones a blessing while cutting bread (facing page). Salt is ever-present on the table to conform with the commandment: "with all thine offerings thou shalt offer salt." (LEVITICUS 2:13)

wildfire, inflaming the hearts and minds of vast numbers of east European Jews, learned and unlearned alike. It was a genuine democratization of Jewish religious life, making the deepest spiritual experience accessible to the many as well as to the few.

After the death of the Baal Shem Tov—a title meaning, roughly, "Master of the Good Name"—his closest disciples established a number of Hasidic communities, where the fervor of his teachings continued to burn bright. These leaders became known by the title *rebbe*—a designation not to be confused with *rabbi*, though both mean "my master" or "my teacher." Any pious and learned man may become a *rabbi*, but only the rarest of individuals has the transcendent qualities required of a *rebbe*.

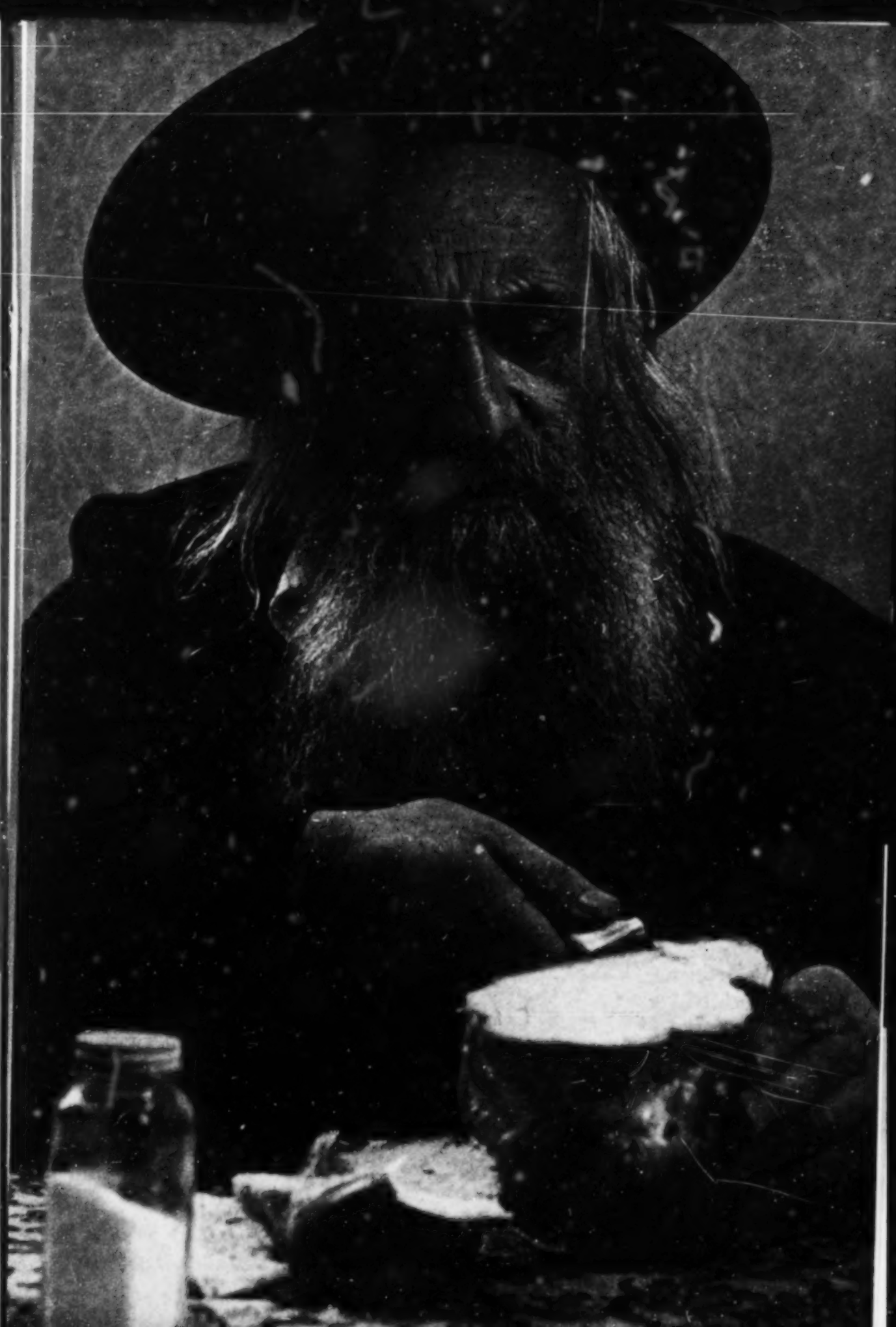
IN TIME—and this has often been criticized by outsiders—the leadership of Hasidic communities became largely dynastic, usually being passed from a *rebbe* to one of his sons. The community's loyalty to the *rebbe* is easily transferred to the offspring. On some occasions, in the absence of a suitable direct heir, a son-in-law or an especially eminent disciple is chosen.

The modern Jewish writer and philosopher Martin Buber devoted a great deal of his life's work to collecting tales concerning the various Hasidic *rebbs*. His two-volume *Tales of the Hasidim*, a monument of scholarship, mirrors both the charm and the profundity of Hasidic thinking.

Though Hasidism has unquestionably evolved since the time of the Baal Shem Tov, becoming more formalized in its rituals—some critics would even say rigidified—I found its original message of joyful communion with God still ringing loud and clear in the streets of Brooklyn.

I recall one night being swept up in the ecstatic revels of a group of rabbinical students. For hours, to the sour strains of an improvised trumpet-and-accordion band, they snake-danced in a great writhing, singing, chanting mass that seemed to become more and more energized as the minutes throbbed along. Joining in, somewhat reluctantly at first, I put my hands on the shoulders of the Hasid in front of me and allowed myself to be swept along on that mounting black wave of communal ecstasy.

At one point I found myself swaying beside Moishe Green, whose forehead was pearly



with sweat. His eyes glowed. "You see," he breathed, "we aren't just dancing. We're soaring to God!"

Even in a milieu where the spiritual predominates, the rent must be paid and groceries bought. The Baal Shem Tov himself often worked at humble jobs, and his followers in Williamsburg frequently do likewise.

THE HASIDIC MODE OF LIFE, with its wide range of behavioral and educational restrictions, makes holding many kinds of well-paying jobs extremely difficult. You often see bearded Hasidim with dancing earlocks and sweating brows driving pickup trucks, heaving crates, working as clerks or storekeepers. Many work in Manhattan as diamond cutters and merchants—bringing much-needed cash into the financially pinched Williamsburg community. Hasidic women as well as men work in the "needle trades," manufacturing garments for firms often owned by Orthodox Jews.

"We are part of the capitalist society," Rabbi Albert Friedman, a community leader, said. "We take jobs that do not interfere with our way of life. Yes, we have some wealthy men whom God has blessed with financial success, and they share—are expected to share—with the others."

A great many Hasidim work in jobs that fill the exacting and specialized needs of the community. Meat, for instance, must not be simply kosher but *glat* kosher, that is, kosher beyond any conceivable question. The Hasidim frankly distrust any food that they themselves have not subjected to the most rigorous conformance with Jewish dietary law.

Hence, most of the food consumed by the Hasidim is prepared with fastidious care within the community itself. Ritual slaughterers dispatch cattle and chickens according to ancient laws. Stores feature "Jewish milk" from dairies supervised by observant Jews. Wheat for the Passover matzo, or unleavened bread, is guarded with unceasing vigilance from the time it is harvested and milled until it comes piping hot and crisp from glowing bakery ovens in Williamsburg. If so much as a single drop of water comes in contact with the flour before it is used—hence allowing it to leaven however slightly—the entire batch is rendered useless for Hasidic consumption. This extraordinary care in food preparation has great appeal for other Jews, and some non-Jews as well. Outsiders' purchases of Hasidic



"I have built an house of habitation for thee. . . ." II CHRONICLES 6:2

Home for the Hasidim is another temple. Young girls in a Hasidic household (above) skylark over a coloring book while their father, a rabbi, characteristically pores over a volume of the Talmud. These youngsters are among the 13 of the rabbi's second marriage; he lost his first family at Auschwitz.

Not burdened with Talmudic studies, Hasidic girls have time to absorb more of "outside" culture than boys. At girls' schools run by the community, they learn practical skills like sewing (right).



foodstuffs help buoy the community's economy.

You'll find no doctors or lawyers among the Satmar Hasidim, since they don't acquire the education needed for the professions. Besides, going to college is frowned upon—a waste of time in a life devoted to the study of the Torah and its vast exposition, the Talmud.

AT THE AGE OF 3, a boy has his first haircut, leaving him with shaven crown and untouched earlocks. Next he is taken to the bes medresh. There a dab of honey is placed on an aleph—first letter of the Hebrew alphabet—in the Torah; his finger is placed on this, and then on his lips, to show him that the study of God's law is sweet. Thus begins a lifetime "toiling in the Torah."

Teenage boys often arrive at their school, or *yeshivah*, to begin study at five in the morning and, what with a day of study and prayers, don't arrive home until eight in the evening. A few hours in the afternoon are spent on what the Hasidim call "English"—meaning not just the English language, which many children first learn in school, but all the curriculum required to meet minimal New York State educational requirements, subjects such as math, history, and geography.

"The plain fact is," I was told, "many parents would rather their children didn't learn any more 'English' than necessary."

Said another Hasid: "Constant study of the Torah and Talmud sharpens the mind to a phenomenal degree. Some of our boys have become computer programmers—a profession requiring keen logical skills."

You see them studying, usually in pairs, the great tomes of the Talmud spread before them on desks or tables. Rarely do they use a pencil while studying, instead storing in their minds endless passages of Jewish law and tradition. Some go on to be ordained as rabbis, but, in actual fact, relatively few of Satmar's scholars are needed for rabbinical posts. Most marry in their late teens or early 20's, study for a final year or so full time—if the family can afford it—then find a job. For the rest of their lives they will spend much of their free time on Torah study.

"Think what they might do if all that study were directed to some worldly purpose," I remarked to a non-Satmar Hasid knowledgeable about the outside world.

"I suppose so," he said. "After all, look at Freud, Marx, Einstein—all Jews who made

their mark on the non-Jewish world. To me, however, they would have been much better off studying in a yeshivah. What a waste of three fine Talmudic minds!"

Hasidic girls get a much more rounded education, by American standards, than the boys. Not encouraged to study the Talmud, they need learn only the traditional practices required of a Hasidic housewife in running a completely orthodox home. Hence, they have vastly more time for worldly studies, and in speech, manner, and appearance often seem more Americanized than the men.

The pivot of their lives is the home, which in Williamsburg usually means modest quarters in an elderly apartment building, a brownstone, or a housing project. Even in the dimmest basement apartment, there shines an inner sunlight, a glow of *Yiddishkeit*. To this sanctuary of feminine order and arrangement, the men and older boys often come rushing home from work or study for a hastily gulped meal with the family, then fly out again into the night for evening prayers at the bes medresh.

On the Sabbath, of course, all this hubbub comes to a serene standstill, and the woman's role as queen of the household comes to the fore. As wife and mother she lights the Sabbath candles—an act of utmost sanctity that leaves no doubt as to her vital position in the family. Often, when not tied down to little ones, she takes a job to supplement the family income. On the occasions when women attend the bes medresh, the balcony is set aside for them. A latticed screen separates them from the menfolk, who are not supposed to be distracted from their prayers by the presence of the opposite sex.

If their lot seems a far cry from women's liberation, I found few complaints. "Nothing is more satisfying than a Jewish life lived in the Hasidic way," one housewife told me.

WITH NATHAN BENN one afternoon I knocked at the door of the basement apartment of a Hasidic friend, a rabbi—and thoughtlessly extended my hand in greeting to his wife.

"Oh, no," she said, stepping back. "I can't shake hands, I'm sorry. Please take no offense." I had forgotten that Hasidic women do not touch men other than their husbands and close relatives. Even between a man and wife, it is exceedingly rare to see an overt display of affection.

Later we sat down with the family to a wondrous meal of chicken soup and gefilte fish, boiled chicken and whitefish, potato *kugel*, and so on—an archetypal Jewish feast. The rabbi intoned a sequence of blessings in a marvelously moving cantorial tenor. As we ate, we imbibed deep draughts of Talmudical lore along with frequent glassfuls of fruit-flavored Mayim Chaim—a brand of kosher soda pop whose name means "water of life" or "living water."

At one point in the meal, Nathan poured

himself a glass of Mayim Chaim. Seeing my glass nearly empty to his right, he swiveled the bottle around and started to fill it. The entire family gasped.

"That is not done, Nathan!" admonished the rabbi. "It is simply not done!"

"But what did I do?" Nathan asked.

"Oh... well... after all, Nathan, how could you know?" said the rabbi evasively.

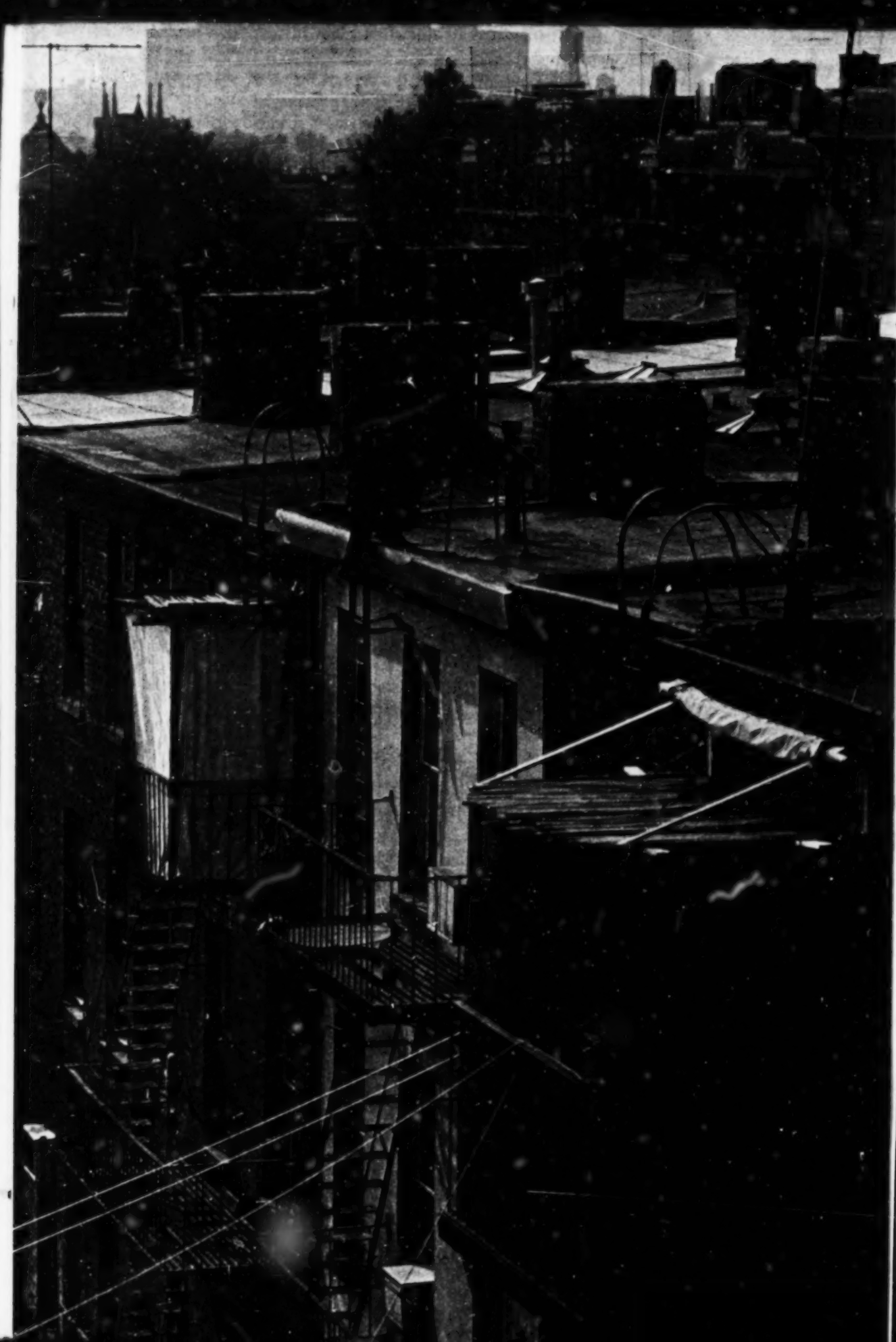
"Know what?" Nathan pleaded.

"Please," said the rabbi, "we talk no more about it. The subject is finished."



"She looketh well to the ways of her household, and eateth not the bread of idleness." PROVERBS 31:27

Doting Hasidic mothers turn a street corner into a happy hubbub of exclamations over a friend's offspring. In accordance with a centuries-old practice, most Hasidic women have their hair sheared upon marriage, thereafter covering their heads—as have these women—with wigs and kerchiefs.



With that, he lapsed into Yiddish, refusing to discuss the matter further.

Later, recalling the incident to another Hasid, I demonstrated how Nathan had poured my glass of Mayim Chaim.

"Stop!" he cried. "Don't do that!"

"Do what?" I asked.

"The way you're pouring the bottle, turning your hand backward like that... it's how one performs the ablutions when washing the dead! We never make such movements in normal situations."

Once again I had run headlong into the multifarious rituals that at times seem to surround the Hasidic way of life like a spearpoint fence, making entrance difficult for outsiders, and egress no easy thing for the Hasidim themselves. Yet, in the eyes of the Hasidim, each spearpoint in that fence safeguards the fulfillment of their holy covenant with God. Their adherence to every last punctilio of religious law is no mere rote act but a conscious fulfillment of God's command, bringing about the sanctification of even the smallest acts of everyday life.

WITH THE OUTSIDE WORLD, the Satmar Hasidim seemed to me to live not so much side by side as back to back. I recall one afternoon approaching on the street a Roman Catholic nun whose church, with a largely Spanish-speaking congregation, stands almost incongruously in the middle of Williamsburg's Hasidic neighborhood. When I asked her about her experiences with the Hasidim, she simply shook her head. "I have lived in this parish for 13 years," she said, "but never has a Hasid come up and spoken to me. Not once. They don't even catch your eye."

Police detective Nino Marano, whose beat has been Williamsburg for years, told me: "The Hasidim rarely bother other people, and would just as soon other people didn't bother them. We've had periodic trouble—fights between Hasidim and other ethnic groups. But you rarely see a Hasid who starts the trouble—though they often seem to attract it just by being so different and standoffish. Once a Hasid made insulting remarks when I ticketed his truck for a parking violation. Another Hasid reported the man's conduct to the *bes din*, the religious court, where the Hasidim prefer to handle their own civil infractions. Hearing the case, the rabbis berated the man and he apologized. I was much

more satisfied than if he'd been hauled before a civil judge."

Nearly all Hasidim take pride in becoming American citizens, which allows them to vote. "We are often the swing vote in local elections and political affairs," Rabbi Friedman told me.

Although the Satmar Hasidim share to some degree in community funds made available by various government agencies—they pay taxes, after all, like everyone else—they



"Ye shall dwell in booths seven days." LEVITICUS 23:42

Fire-escape sanctuaries, *sukkahs*, or "booths" (facing page), recall the Israelites' abodes during the flight from Egypt. After fixing his sukkah's roof, a Hasid descends by way of his neighbor's ladder. Interiors may be richly decorated (above). Here family members dine during the Festival of Booths.



"I place my soul within His palm before I sleep. . ."

HEBREW SIDDUR, OR PRAYERBOOK

Day ends as it began, with prayer. A Hasidic youngster caps off hours of study and prayer with—of course—more study and prayer. Throughout the day he wears a *tallis koton*, or "little prayer shawl," as prescribed by Mosaic law. The garment's fringes, like those of the larger shawl worn by married men at morning devotions, are a constant reminder of the 613 divine commandments in the Torah—the Hasid's ageless guide to God's law and daily living.

prefer self-help to reliance on outsiders. They not only run their own school system out of Satmar funds, but also operate a walk-in clinic, a nursing service, an emergency first-aid and ambulance service, a private community bus service, a summer camp system, an employment agency, and a free-loan society. They very definitely care for their own.

Recently they have also established a small self-contained community for a few hundred Hasidim at Monroe in New York's Orange County—about an hour's drive upstate. Does this signal a mass exodus from the inner city? Probably not, at least for the near future. Immediate plans for the Monroe complex envisage a community of perhaps 250 families. "We are not running away," Rabbi Friedman explained. "We are simply growing."

While I toured a Satmar school for girls, the principal, Rabbi Naftali Hertz Frankel, pointed out how reverently the children repeat the Pledge of Allegiance.

"Almost all of them are the grandchildren of concentration camp survivors," he said. "They *know* how much America and its freedom means. To them, the Pledge of Allegiance is almost a kind of prayer."

TAKING LEAVE of Williamsburg, I stopped off to say good-bye to a bearded old Hasidic friend at the tiny Xerox shop he manages on Lee Avenue.

Between running off copies for customers, he spoke of his first family—all killed in the concentration camps—and of the blessings of raising a second family in "a nice Yiddish place like Williamsburg."

The green light of the Xerox duplicator flickered on his gray beard and earlocks. I recalled an old Jewish tale I had heard about Hanoch the shoemaker, as one of the 36 legendary "secret tzaddikim," or holy men, who—unbeknownst even to themselves—help sustain the universe with their piety.

Hanoch, goes the legend, uttered praises of the Lord with each stroke of his tack hammer. Watching my Hasidic friend reel off another batch of Xerox copies, I conjured up the image of him, too, as one of the secret 36, uttering praises to God each time he pushes the "print" button on the Xerox machine for another copy.

It was one last indelible image to carry with me as I took the subway from Williamsburg to that other world in Manhattan. □

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OCTOBER TERM 1975

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HUGH L. CAREY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The decision of the district court granting the defendants' motions to dismiss (Pet. App. 53a-58a)¹ is reported at 377 F. Supp. 1164. The order of the court of appeals dated July 16, 1974, denying interlocutory relief (App. 324)² is not reported. The order of the court of appeals dated August 23, 1974, affirming the denial of plaintiffs' motion for preliminary injunction (App. 326) is not reported. The 2-to-

¹ "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case.

² "App." refers to the Appendix filed with this Brief.

1 decision of the court of appeals affirming the district court's dismissal of the action (Pet. App. 7a-50a) is reported at 510 F.2d 512.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1975 (Pet. App. 5a-6a). A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on February 27, 1975 (Pet. App. 3a-4a). On May 19, 1975, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 27, 1975 (Pet. App. 2a). On June 25, 1975, Mr. Justice Blackmun extended the time within which to file a petition to and including July 18, 1975 (Pet. App. 1a). The petition was filed on July 17, 1975, and this Court granted the petition for certiorari on November 11, 1975. 44 U.S.L.W. 3279. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Fourteenth and Fifteenth Amendments were violated by a deliberate racial gerrymander under which election lines were drawn on a racial basis to secure ten districts with white voting populations at 35 percent or less.

2. Whether such a gerrymander was rendered constitutional by the fact that it was carried out under the instructions of the United States Department of Justice, purporting to implement the Voting Rights Act of 1965.

3. Whether a racial gerrymander can be viewed as "corrective action" to remedy past discrimination if there has been no affirmative finding by any court or government agency that there was past voting dis-

crimination which required correction and if there is no rational relationship between the form of the remedy and the nature of the discrimination it assertedly "corrects."

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Fifteenth Amendment to the United States Constitution:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

STATEMENT

1. Introduction

This case concerns the constitutionality of a plan of legislative apportionment approved by the New York legislature in special emergency session convened in late May 1974 in response to the disapproval, by the United States Department of Justice, of New York's 1972 reapportionment insofar as it affected New York and Kings Counties. The record establishes, beyond any doubt, that the challenged apportionment

was devised within severe time constraints attributable to the last-minute announcement of the Department of Justice, which left the New York authorities with insufficient time to secure judicial review of the Justice Department's disapproval of the 1972 districting. The time limitations also affected this litigation. Suit was filed promptly after the apportionment was announced and its effect on the plaintiffs became known. But even with this expeditious action, the litigation was thought by the district court (App. 22) and by the court of appeals as trenching too close to the actual time for balloting and, on this basis, all interlocutory relief designed to maintain the status quo was denied (Pet. App. 17a, n.9).

Time is again a factor insofar as the 1976 elections are concerned. For the reasons outlined in this brief, we believe that petitioners' voting power has been unconstitutionally diminished ever since May 1974. Another election will be held this year, and preliminary electoral activity will begin many months before Election Day.³

2. A Description of the Plaintiffs

The plaintiffs are eight individuals and an "umbrella" community organization which represents the Jewish residents of the Williamsburgh area of Brooklyn. All the individuals are voters registered at their home addresses in the area, and their complaint alleges that the effect of the challenged reapportionment is to dilute their vote, solely because of their race, in violation of the Fourteenth and Fifteenth Amendments (App. 11).

³ January 13, 1976, was the opening date for circulating nominating petitions for district leaders (who are elected along State Assembly lines) and national delegates.

The plaintiffs are representative of the Jewish residents of the Williamsburgh area, who are overwhelmingly adherents of the Orthodox Jewish faith and form a closely knit community of Hasidim.⁴ The Williamsburgh Hasidim began to settle in substantial numbers in the area during and after World War II, with the early settlers being refugees from the Nazi holocaust and survivors of the Nazi concentration camps. For almost 30 years, the community has developed and grown as a substantially self-sustaining and totally law-abiding group. Its present total population is approximately 30,000 (App. 77).⁵ It is a closely knit community, led in all religious and spiritual matters by a rabbi and, in its other activities, by selected lay leaders. Because of distinctive religious rules and practices, which are scrupulously observed, the members of the group are immediately identifiable by their appearance and dress. They have encountered substantial discrimination and hostility from the outside world (App. 75-76), and this has caused their leaders to turn increasingly to their elected officials to secure protection of their right to live peacefully and secure-

⁴ The nature of the community involved in this case is graphically described, in words and pictures, in a recent article that appeared in *The National Geographic* of August 1975. That article was appended to Petitioners' Reply Brief in Support of the Petition for a Writ of Certiorari. A leading study of the Hasidim, "The Hasidic Community of Williamsburg" by Solomon Poll, was introduced in evidence at the hearing of June 20, 1974, as Exhibit 9.

⁵ Evidence regarding the Hasidic community was introduced at the hearing before Judge Bruchhausen on June 20, 1974, which is reproduced in full in the Appendix. The transcript of the afternoon session of the June 17, 1974 hearing appears there as well. By oversight, no transcript was made of the morning session of the June 17, 1974, hearing.

ly and free of unlawful discrimination (App. 6, 77-78). Over the past 30 years, other white residents of the Williamsburgh area left the region and moved elsewhere, but the Hasidic community has remained (App. 79). It now finds itself surrounded by neighborhoods which consist almost entirely of black and Puerto Rican residents.

It is undisputed that during the past 25 years, while the Hasidic community has resided in Williamsburgh, the entire area in which the Hasidim live has been included in one State Senate District and one State Assembly district.⁶ This recognition of the unitary nature of the community encouraged those in the Hasidic community who are seeking to improve participation in the democratic process to begin registration drives and promote voting on election day.

3. Hasidic Participation in the Electoral Process

Because Hasidim still carry over the customs and traditions of their European ancestors, they consider the democratic process strange (App. 38-39). In addition, as the remnants of the destruction and terror of concentration camps, they view the outside world with great skepticism and mistrust (App. 39). Much of the community believes that it must "continue with the self-imposed exile of remaining in a ghetto, of not joining the mainstream" (App. 78), and its individual members have, therefore, been most reluctant to participate in any way in the process of registration

⁶ We mention this fact *not* because we contend that there is any right—constitutional or statutory—for permanent recognition of a community in legislative apportionment. Our argument is, rather, that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.

and voting.⁷ Certain leaders have, however, persuaded segments of the community that it is in the group's best interest to register and to vote, but this effort to achieve participation has not been easy; it has "taken all we could do" (App. 39).

In the interests of the community, the group's leaders have dealt with elected officials and publicly supported candidates who would best serve the community's interest. The history of this support has shown that the Hasidic community is not racially or religiously discriminatory in its political preferences. In 1972, the community actively supported a Catholic candidate for the United States Congress over two Jewish opponents (App. 42-43). It supported a Puerto Rican woman for the job of Democratic District Leader over white opposition, as well as other non-Jewish candidates against Jewish opposition (App. 75).

4. The 1972 Legislative Apportionment

Legislative apportionment in New York has been the subject of substantial litigation. In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), the Supreme Court held that New York's apportionment scheme was constitutionally invalid. Despite further litigation in the federal and state courts,⁸ a proper formula that would

⁷ The descriptions summarized here are taken from the testimony given by Rabbi Albert Friedman and Rabbi Chaim Stauber at the hearing on June 20. Both are community leaders, the former being vice-chairman of the Williamsburgh Community Corporation and the individual who has led political efforts by the community, and the latter being the editor of the principal Yiddish newspaper serving the community.

⁸ *E.g.*, *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y.), *aff'd* 382 U.S. 4 (1965); *WMCA, Inc. v. Lomenzo*, 246 F. Supp. 953 (S.D.N.Y.), *aff'd sub nom.*, *Travia v. Lomenzo*, 382 U.S. 4 and 382 U.S. 9 (1965).

be consistent with federal constitutional standards and with the New York State Constitution's requirements was not determined. Finally, in *In the Matter of Orans*, 15 N.Y. 2d 339, 206 N.E. 2d 854, *appeal dismissed*, 382 U.S. 10 (1965), the New York Court of Appeals definitively construed the New York State Constitution and established a Judicial Commission which drew up an apportionment plan to meet both sets of standards. The Commission's report was adopted by the New York Court of Appeals in 1966 (*In the Matter of Orans*, 17 N.Y. 2d 107, 216 N.E. 2d 311 (1966)), but the 1965 election had been conducted under federal court order which implemented the only one of four plans that satisfied federal constitutional standards. *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y.), *aff'd*, 382 U.S. 4 (1965).

The New York Legislature had, on March 15, 1965, established a Joint Legislative Committee on Reapportionment to apportion the Senate and Assembly in conformance with the provisions of Article III of the New York Constitution insofar as those do not conflict with the one man-one vote requirement of the equal protection clause of the Fourteenth Amendment. On December 14, 1971, the Committee, whose Executive Director was Richard S. Scolaro (a witness at the June 20 hearing), issued a report in which it proposed substantially the apportionment of the New York State Legislature that was adopted in January 1972. Law of January 14, 1972, ch. 11, §§ 120-128 (1972), McKinney's Sessions Laws of New York.

In December 1971, the State of New York instituted an action in the District Court for the District of Columbia under Section 4(a) of the Voting Rights Act, as amended, 42 U.S.C. § 1973 b(a), seeking a declara-

tory judgment that New York was exempt from the provisions of the Act.⁹ On April 3, 1972, the United States consented to the entry of summary judgment in that case. Four days later, the NAACP requested leave to intervene. The motion to intervene was denied, and the three-judge district court granted New York State's motion for summary judgment. *New York v. United States*, Civ. No. 2419-71 (D.D.C.) (unreported).

The NAACP then appealed to this Court from the denial of its intervention motion. Although it affirmed the decision below, this Court indicated that, in view of the district court's mandatory retention of jurisdiction under the Voting Rights Act, the NAACP would be able to intervene and assert any claims it might make at a later date. *NAACP v. New York*, 413 U.S. 345 (1973). Thereafter, such intervention was allowed, and the argument was made to the three-judge district court that the failure to provide ballots in Spanish constituted the use of a discriminatory "test or device." See *Torres v. Sachs*, 381 F.Supp 309 (S.D.N.Y. 1974). On January 4, 1974, without issuing any opinion, the three-judge District Court for the District of Columbia rescinded its earlier declaratory judgment and entered an order determining that New York, The Bronx and Kings counties were covered by the Act.

⁹ The "automatic trigger" of the 1970 Amendments to the Act, 42 U.S.C. § 1973 b(b), had brought New York, The Bronx, and Kings counties within the Act's coverage because "tests or devices" had been used in those counties and less than 50 percent of voting age residents had voted in the 1968 Presidential elections. 36 Fed. Reg. 5809 (1971). Accordingly, it was the State's burden to prove that no tests or devices had been used with the purpose or effect of denying the right to vote on account of race.

This Court affirmed. *New York v. United States*, 419 U.S. 888 (1974).

Pursuant to the District Court's conclusion, the 1972 apportionment was submitted on February 1, 1974, to the Attorney General of the United States under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973(c). On April 1, 1974, in a letter to the Office of the Attorney General of New York from Assistant Attorney General J. Stanley Pottinger, the Department of Justice disapproved the 1972 apportionment insofar as it affected certain election districts in New York and Kings counties. Although the NAACP tried to persuade the Department of Justice that there had been racial gerrymandering in those counties in the past and that lines were deliberately drawn for the purpose of discriminating against minorities (App. 201-231), the Assistant Attorney General made no such findings. The only basis for disapproval was that the State had failed to meet its burden of proving that the apportionment would not have the effect of abridging the right to vote on account of race. As to State Senate and Assembly districts in Kings county—which is what this case involves—the Department of Justice found the following (App. 15):

Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist.

5. The Response of New York State Authorities

Although Section 5 of the Voting Rights Act authorizes the State to obtain a judicial determination regarding any change in voting practice or procedure which it seeks to implement, even if the Attorney General disapproves of such change, the New York State authorities did not institute any proceeding to this end.¹⁰ Their view was stated in the subsequently issued report of the Joint Legislative Committee on Reapportionment (App. 174):

While the Joint Legislative Committee on Reapportionment does not subscribe to the ruling of the Justice Department as expressed in the April 1 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time require that new legislation be enacted to satisfy immediately the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974.

The opinion that the Department of Justice was wrong was held by Mr. Scolaro, as well as by the members of the Joint Legislative Committee (App. 177). However, because the legislature felt "forced to the wall by reason of time" (App. 102), the committee drew up the plans which are substantially those under challenge in this case.

¹⁰ Judge Bruchhausen's opinion says that "several groups sought to appeal the ruling of Mr. Pottinger, but met with failure when their actions were dismissed by the District Court for the District of Columbia" (Pet.App. 55a). This assertion refers to an action filed on behalf of four state legislators, whose complaint was dismissed on the ground that they had no standing. *Griffith v. United States*, 74 Civ. No. 648 (D.D.C.).

In order to meet this deadline, Mr. Scolaro had "one very lengthy meeting in person" and many telephone conversations with Department of Justice attorneys to learn what criteria would satisfy the Department (App. 103-104). He was never given a specific percentage figure, but he and other staff members were told that it would be necessary to devise two more Senate districts and two more Assembly districts with "*substantial* non-white majorities" (App. 179-182; emphasis added). The Assembly district in which the entire Williamsburgh Hasidic community was located under the 1972 apportionment had a non-white population of 61.5 percent, but the Department of Justice indicated that this was not sufficiently "substantial" (App. 98-99, 105). Scolaro then inquired how much higher the nonwhite percentage would have to be (App. 105-106):

I said how much higher do you have to go? Is 70 percent all right?

They didn't say yes or no, but they indicated it is more in line with the way we think in order to effect the possibility of a minority candidate being elected within that district.

I suggested 65 percent. It came out at that time that is a figure used by the NAACP in numerous briefs and other documents.

I got the feeling, and I cannot vouch for this as a matter of having been specifically said, but I left that meeting indicating that 65 percent would be probably an approved figure.

Scolaro also testified that, as a result of his meetings and discussions, "I thought it was logical for me to assume anything under 65 percent would not be acceptable" (App. 106).

In his discussions with the Department of Justice, Scolaro pointed out that if the white residents of the area had to be fragmented to meet the higher percentage demanded, the Hasidic community would no longer be "contained as an integral unit" (App. 116). He concluded that the Department of Justice had no understanding of that problem and attorneys in it did not even know where the community resided and where Williamsburgh was located (App. 117). In trying to preserve the Hasidic community as a unit in the 57th Assembly District, the Committee could come up with no greater percentage of nonwhites in that district than 63.4 percent. Scolaro testified (App. 115):

[I]t was our determination at that time, after all of our consultation with the Justice Department, that increasing a percentage from 61.5 to 63.4, would not be acceptable to effect compliance . . .

Accordingly, the reapportionment plan under which the Hasidic community was divided—almost in half—for Senate and Assembly district purposes was recommended and approved by the legislature as Chapters 588, 589, 590, 591 and 599 of the Laws of New York of 1974, whose constitutionality are being challenged in this action. Scolaro's testimony was (App. 112; emphasis added):

Q. So that your reason for dividing the Hasidic community was to effect compliance with the Department of Justice determination, and the minimum standard they impose—they appear to impose?

A. *That was the sole reason.* We spent over a full day right around the clock, attempting to come up with some other type of districting plan that would maintain the Hasidic commun-

ity as one entity, and I think that evidenced clearly by the fact that that district is exactly 65 percent, and it's because we went block by block, and didn't go higher or lower than that, in order to maintain as much of the community as possible.

6. The Effect of the 1974 Apportionment

There was no advance warning to the Hasidic community that it would be cut in half by this apportionment on account of the race of its members. Witnesses have testified that the effect of the announcement was "devastating. . . a direct slap in the face" (App. 40). Rabbi Stauber, editor of the community newspaper, testified that many people had suggested to him that this was retribution upon the community "for really having the guts and having the clout to be a considerable force and factor in the political life of the City" (App. 78), and that others—reflecting the view of the skeptics—had said that "we are simply being penalized for taking a stance in politics, for not knowing our place, so to speak, remaining in Synagogues, instead of coming out and really turning out the vote" (App. 78). As a result, "the voting drive has stalled" (App. 42). The community is now saying "why come out again and vote for these very people or any other" (App. 80). The morale of the community "has sagged to an all time low" (App. 80).

7. Litigation

On June 11, 1974, this action was instituted. A hearing was held before Judge Bruchhausen on June 17, 1974, the first day for circulating nominating petitions under the State's "political calendar." Counsel for all parties were present, as well as counsel for the

NAACP, which had been served with the papers because of its obvious interest in the case. Plaintiffs requested a temporary restraining order that would maintain the status quo and not authorize the gathering of signatures in questionable districts during the pendency of the litigation. Judge Bruchhausen first said he would enter a temporary restraining order and directed counsel to agree on its terms. After a recess, counsel for the Kings County Republican Committee entered an appearance and argued that since petition-gathering had begun that morning the work of many party members would be wasted if an order were entered. On determining that counsel for the Kings County Republican Committee was opposed to the temporary restraining order, Judge Bruchhausen said, "Once, once in a while, I reverse myself. I think I have heard enough pro and con. I will not enter the TRO" (App. 22).

A hearing was held on June 20, 1974, on plaintiffs' motion for a preliminary injunction. Evidence was taken, and full cross-examination was permitted. Under an accelerated briefing schedule, the full initial briefs were filed with the district court by June 29, 1974. In addition to the request for a preliminary injunction, plaintiffs moved, on the basis of the evidence at the hearing, for summary judgment. The Attorney General of the United States also moved to be dismissed as party defendant, although a representative of the United States Attorney's office was present throughout both hearings and was afforded full opportunity to argue, offer evidence, and cross-examine (App. 19).

On July 1, 1974, Assistant Attorney General Pottenger issued a letter approving the 1974 apportionment

with an explanatory memorandum which stated why the plan was being approved even though it did not benefit Puerto Rican voters. With regard to the claims of the plaintiffs, the Memorandum stated that there was no indication in the history of the Fifteenth Amendment or the Voting Rights Act "that Hasidic Jews or persons of Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act" (App. 293).

When Judge Bruchhausen failed to rule on the pending motions by July 12, 1974, the plaintiffs sought relief from the court of appeals on the ground that the closing date for nominating petitions was July 17 and they would be seriously harmed if there were no judicial action by that time. The court of appeals dismissed that appeal on July 16, 1974, and denied a request for interlocutory relief, on the grounds that there was still no appealable order that had been issued by Judge Bruchhausen. The denial was, however, "without prejudice to renewal" (App. 324).

On July 25, 1974, Judge Bruchhausen filed his opinion and order. He ruled that the plaintiffs' claim was "untenable" because the approval by Assistant Attorney General Pottinger on July 1, 1974, made the apportionment lawful under the Voting Rights Act and because the plaintiffs are not constitutionally entitled to "separate community recognition" in the apportionment process (Pet.App. 57a). He also held that "racial considerations have been approved to correct a wrong" (Pet.App. 58a).

8. The Court of Appeals' Decision

Briefing and argument of the appeal was expedited so as to secure review in time to affect the 1974 elec-

tion. On August 23, 1974, the court of appeals issued an order affirming the denial of a preliminary injunction (App. 326), and the court's full opinion affirming the district court's judgment was issued on January 6, 1975. Speaking for the majority, Judge Oakes held that there was district court jurisdiction over the action and the petitioners had standing to maintain it as white voters (Pet.App. 20a-27a). He ruled that the Attorney General should have been dismissed as a party defendant (Pet.App. 21a),¹¹ and otherwise affirmed the dismissal of the complaint. Viewing the case as if it were a challenge by the white community to a fully considered legislative districting plan which diluted white voting power, the majority said that the evidence was insufficient to prove political or other racial discrimination against whites in Kings County and that whites were proportionately represented in the State legislature (Pet.App. 27a-28a). It sustained the purposeful use of racial criteria on the ground that it was necessary "[t]o correct an invidious discrimination in favor of white voters and against nonwhites" (Pet.App. 31a). The majority's holding was summarized as follows (Pet.App. 31a-32a):

[S]o long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or nonwhite, that districting is not subject to challenge.

Judge Frankel dissented on the ground that it is unconstitutional to draw district lines "with a central

¹¹ Judge Bruchhausen never formally ruled on the Attorney General's motion to dismiss.

and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts" (Pet.App. 32a-33a). He concluded that it was "at war with our bedrock concepts of individual worth and integrity" deliberately to organize "a polity . . . into districts whose people are proportional according to whether they are white, black, yellow . . ." (Pet. App. 39a). Judge Frankel rejected the assertion that the racial standard was permissible "corrective action" on two grounds: *First*, that neither the legislature nor any other responsible official had found the 65 percent quota to be an appropriate corrective measure for anything, and *second*, that no reasonable basis could be found in the record for such a standard (Pet. App. 40a). Judge Frankel noted, in conclusion, the "unbearable and absurd implications" of the proportional representation remedy urged by the New York Legislature which would require similar treatment for a "dizzying mass" of racial and ethnic groups (Pet. App. 49a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This is not the first case involving an allegation of racial gerrymandering to come before this Court, but it is the first such case in which there is absolutely no factual dispute as to the legislature's dominant purpose or motive. The majority of the court of appeals began its opinion by noting that the central issue was whether an apportionment "specifically drawn to ensure nonwhite voters a 'viable majority'" (Pet. App. 9a) is permissible under the Fourteenth and Fifteenth Amendments. The undisputed proof demonstrates that there is only one reason why the petitioners here—members of the Hasidic community of Williamsburgh

—now find themselves divided and voting in separate state senate and assembly districts: Its members are white and they could not be maintained as a unit in the legislative districts where they previously were located without having the white population of those districts exceed 35 percent.

If the petitioners' skin were black, brown, red or yellow, the apportionment challenged here would never have reached this Court. Any federal judge mindful of his oath to enforce the Constitution would instantly strike down a districting scheme which was flagrantly designed to keep blacks, Chicanos, Indians or orientals at not more than 35 percent of an election district. The only ground on which this legislation was defended below and is defended here is that it is "compensatory districting," designed to benefit certain nonwhite residents of Brooklyn by including them in electoral units where nonwhites will have a "viable majority."¹² We challenge the underlying proposition that race-consciousness is desirable or constitutionally permissible in legislative districting when done for "benign" motives. We believe that the Fourteenth and Fifteenth Amendments no more permit this form of color-conscious manipulation of the electoral process when those doing the manipulating are seeking to help blacks than when they are trying to minimize or reduce

¹² We have, as we indicate below, pp. 56-57, *infra*, substantial questions as to the legitimacy—both in terms of the Constitution and in terms of public policy—of the categorization of the groups involved in this case as "white" and "nonwhite" because it absorbs into the second group diverse racial communities whose interests are not helped by such classification. We also wonder what support there is in reason and policy for the notion of a "viable majority"—apparently defined here by *fiat* as 65 percent or more. See pp. 55-56, *infra*.

black voting power. Racially motivated legislative districting invariably promotes racial separation and racial partisanship and sows quickening seeds of racial strife and hatred.

Before turning to an elaboration of this position, we emphasize a point that should not have to be said, but that is best expressed so as to avoid misunderstanding. These petitioners are, personally and as a community, strongly supportive of energetic federal enforcement of the civil rights of racial minorities, particularly the right to vote protected by Article I of the Constitution, the Fourteenth and Fifteenth Amendments, and the federal civil rights laws including the Voting Rights Act of 1965. The vigorous and successful governmental efforts made during the past two decades to assure voting rights for black Americans is a glorious chapter in our nation's history. Invidious attempts to deny, minimize or dilute the votes of blacks or other minorities are offensive to the petitioners, who are, themselves, the small surviving remnant of the most brutal discrimination known to our modern age. But the attempt made here by a misguided—even if benignly motivated—Department of Justice (and, because of federal threats, by the New York Legislature) is not, we believe, part of this great struggle for racial equality. It is an effort, rather, to achieve short-range benefits at great long-range costs, and it demeans the lofty principles of equality which have marked earlier civil rights efforts, including the enactment in 1965 of the Voting Rights Act.

Our challenge to the New York legislation proceeds on three alternative grounds. Our first argument is the most simple and clear-cut, and it also rests on the broadest holding which we urge on the Court. We

argue first that there is *never* any justification for race-consciousness in the electoral process. This Court has approved of color-conscious remedies in certain limited areas—particularly in the integration of previously segregated public schools and in the opening of employment opportunities previously closed to minorities. In these circumstances, race may be considered by government agencies, in keeping with the oft-quoted admonition of the Fifth Circuit that “the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.” *United States v. Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967). But we conceive of no factual circumstances in the voting area, similar to that in public education or employment, where race-consciousness is necessary “to undo the effects of past discrimination” or prevent its perpetuation. If an apportionment is or has been racially discriminatory, it may and should be set aside, and a new apportionment—based on “neutral” criteria—should replace it. No seniority builds up in voting—as it does in employment—and no established attendance or assignment patterns develop over years of racial discrimination—as they do with regard to public school students and teachers. Hence the cure for a racial gerrymander, if one is shown to have occurred, is fair nonracial apportionment—not districting designed to maximize the voting power of blacks, Puerto Ricans or any other minority.

Conversely, we argue that the societal costs of race-conscious remedies in the electoral area are very high. Mr. Justice Douglas—who entertained no crabbed view of the importance of totally rooting out racial discrimination—vigorously protested race-conscious

apportionment in his dissent in *Wright v. Rockefeller*, 376 U.S. 52, 61 (1964), bringing within his condemnation both benign and invidious racial gerrymandering. We believe that if legislatures are permitted overtly to draw electoral lines to achieve racial representation, racial partisanship will be encouraged and the premises of the Fourteenth and Fifteenth Amendments will be undermined.

Our second argument assumes, *arguendo*, that there may be some situations where deliberate racial decisions may be made, even in electoral apportionment, to correct "past discrimination" or prevent its "perpetuation." We argue, however, that on the facts of record here, this is plainly not such a case. There has been *no* finding by any judicial or administrative body whatever that there *was* racial discrimination in the drawing of the district lines for the New York State Senate or Assembly in Brooklyn. In fact, the record establishes that, in one of the districts at issue here, "non-whites" numbered 61.4 percent of the total population under the 1972 reapportionment—hardly a powerless minority. The invalidation of New York's 1972 reapportionment by the Department of Justice rested on a very slim reed—the double-negative finding, based on a Justice Department regulation,¹³ that the State's proof had *not* established that the new apportionment had *no* effect on minority-race voting. The 1974 reapportionment was, therefore, not "corrective" of dem-

¹³ See 28 C.F.R. § 51.19, which casts the burden of proof on the issue of "racially discriminatory purpose or effect" on the governmental body submitting a change to the Department of Justice. This regulatory provision was sustained, over the dissents of Justices White, Powell, and Rehnquist, in *Georgia v. United States*, 411 U.S. 526 (1973).

onstrated past discrimination; at most, it was engendered by "evidence . . . in equipoise" (411 U.S. at 545; White, J., dissenting) on an issue where, by regulation, such a balance results in a finding of invalidity.

Accordingly, even if a record establishing past racial discrimination would permit compensatory racial reapportionment, this is not a case involving such a record. Because there was no showing of actual discrimination, the New York Legislature had no constitutional right to discriminate against these petitioners by drawing new district lines in 1974 that limited their race to not more than 35 percent. Nor did the Department of Justice have constitutional authority to demand, or even to suggest, race-conscious discriminatory redistricting where it was unable to find, from the record before it, that there had been racial gerrymandering.

Our third alternative argument is the most narrow, and it relates to the particular quota remedy used by the Department of Justice and the New York Legislature. For purposes of this argument, we accept, *arguendo*, the propositions that (1) there may be instances where race-consciousness is justified in electoral apportionment and (2) there was past racial discrimination in the districting of Brooklyn that warranted some compensatory racial remedy. The record—as well as human experience—is devoid, we believe, of any justification for the remarkable "quota" remedy undertaken by the New York Legislature (acting under the lash of the Department of Justice). If "nonwhites" were, in fact, the victims of racial gerrymanders in Brooklyn in past years, how does a 65 percent quota requirement in several districts neighboring on Bedford-Stuyvesant correct or compensate for that in-

justice? Judge Frankel, in dissent, convincingly demonstrated that there was no rational relation between the remedy chosen and the evil being remedied. Yet it was that remedy—the specific requirement that no more than 35 per cent of the district be white—that resulted in the harm to the petitioners.

ARGUMENT

I

DELIBERATE RACIAL GERRYMANDERING, EVEN IF DESIGNED TO INCREASE THE VOTING POWER OF RACIAL MINORITIES, IS A PER SE VIOLATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

This Court first confronted a racial gerrymander in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which established—even in the days when the “political thicket” principle of *Colegrove v. Green*, 328 U.S. 549, 556 (1946), held sway—that the Fifteenth Amendment would be violated by the deliberate drawing of electoral lines to affect voters on account of their race. The principle of the *Gomillion* case was reaffirmed by the Court in *Wright v. Rockefeller*, 376 U.S. 52 (1964), although the Court’s judgment sustained a decision, on a particular record, that congressional districts which had allegedly been drawn along racial lines were not “the product of a state contrivance to discriminate against colored or Puerto Rican voters.” 376 U.S. at 57. As a result of *Gomillion*, *Wright*, and some lower-court decisions such as *Sims v. Baggett*, 247 F.Supp. 96 (M.D. Ala. 1965) (on remand from this Court’s decision in *Reynolds v. Sims*, 377 U.S. 533 (1964)), the governing constitutional rule regarding alleged racial gerrymandering was articulated as follows by the Court of Appeals for the Fifth Circuit, where most of

such litigation arose (*Howard v. Adams County Board of Supervisors*, 453 F.2d 455, 457 (5th Cir. 1972), *cert. denied*, 407 U.S. 925 (1972) (citations omitted)):

[T]o establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines, or (2) that “. . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”

The undisputed facts of this case satisfy the first of these disjunctive conditions, and therefore make it unnecessary to consider the effect of the districting—*i.e.*, whether it “unconstitutionally operate[s] to dilute or cancel the voting strength of racial or political elements.” *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971). The 1974 New York apportionment, insofar as it affected Assembly Districts 56 and 57 and Senate Districts 23 and 25, was “racially motivated” and was “a plan drawn along racial lines.” If there were no more to this case, this proposition would suffice to render the 1974 redistricting “constitutionally impermissible,” just as Alabama’s 1965 reapportionment of its House of Representatives was invalidated in *Sims v. Baggett*, 247 F.Supp. 96, 107-110 (M.D. Ala. 1965), because racial discrimination “was what the Legislature intended.” 247 F.Supp. at 109.¹⁴

¹⁴ This Court’s most recent discussion of the subject of alleged racial malapportionment fixes, we believe, the guiding principles in this area. In *City of Richmond v. United States*, 422 U.S. 358 (1975), this Court sustained governmental action which had the effect of reducing the relative political strength of a minority

There is, however, one important difference between this case and *Sims v. Baggett*. The racial gerrymander here was not designed to deny voting power to a black or other racial minority that had been deprived of the right to vote in the past. Rather, it had what has come to be known as a "benign" purpose—to maximize the opportunities of black and other non-white citizens to elect legislators who are members of minority races. Thus the initial issue before this Court is the "important federal question" mentioned in *Taylor v. McKeithen*, 407 U.S. 191, 193-194 (1972)—i.e., whether "the colorblind concept" of *Gomillion* and *Wright* forbids even "benign districting" which is used "to overcome the residual effects of past state dilution of Negro voting strength."

For reasons elaborated in later sections of this brief, we believe that even were "benign" racial districting permissible for such a remedial purpose, this record shows no need for a remedy and no rational relation between any alleged "residual effects" and the remedy selected by the United States Department of Justice

race if such action—albeit originally taken for a racially discriminatory purpose—could now be supported by "verifiable reasons." 422 U.S. at 374. Notwithstanding this conclusion, the Court remanded the case for further proceedings to determine whether there were current "justifiable reasons" to overcome the original impermissible purpose.

The Court concluded its *Richmond* opinion with an explanation of why the case was being remanded for "proceedings with respect to purpose alone." It noted that action taken for a racial purpose "has no legitimacy at all under our Constitution or under the statute." It described deliberate conduct of this kind as "gross racial slurs" which "have no credentials whatsoever" no matter what its effect. 422 U.S. at 378-379.

and the New York Legislature. But our initial position is that districting along racial lines is at odds with the fundamental values of our nation and with the historic principles of the Fourteenth and Fifteenth Amendments. Consequently, no matter how "benign" its purpose and irrespective whether it is implemented by a legislature, a judge or a federal executive official, districting along racial lines should be declared unlawful by this Court.

A. Racial Districting Is Divisive

The evil of racial gerrymandering when it is directed against minorities which have previously been denied the franchise or otherwise subjected to racial discrimination requires no elaboration. "It would be unfortunate," as the court noted in *Sims v. Baggett*, 247 F.Supp. 96, 109 (M.D. Ala. 1965), "if Alabama's Negroes were to find, just as they were about to achieve the right to vote, that that right had been abridged by racial gerrymandering." Less obvious, however, is the vice of racial gerrymandering that favors minorities—that is claimed to be "compensatory," "corrective," "remedial" or "benign." In this area, there is some tendency to believe that minority races may, or even should, be favored, on the same grounds as it is argued that there must be corrective "affirmative action" in the fields of public education, employment or housing. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971); *Associated General Contractors v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); *Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3rd Cir.), cert. denied, 404 U.S. 854 (1971). Such a position ignores the unique quality of the elec-

toral process and proceeds on various dubious premises which are refuted by history and common experience.

Representative democracy, as practiced in the United States, does not depend on legislators being directly responsible to particular ethnic, religious, racial or social classes or groups. Dissenting in *Wright v. Rockefeller*, 376 U.S. 52, 59-67 (1964), Mr. Justice Douglas noted the distinction between our system of representative government and the Electoral Register System introduced to India by the British and used, as a form of proportional representation, in other countries. Our legislators represent, and are elected by, voters residing in geographic areas which form electoral districts. It is inconsistent with the postulates on which this system of representative government is based to permit the configurations of these geographic areas to be drawn so as to produce, *ab initio*, legislators who have particular racial or ethnic affiliations. As Justice Douglas observed (376 U.S. at 66):

Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.

Moreover, such a policy in voting heightens the racial partisanship which the Fourteenth and Fifteenth Amendments were designed to overcome. Justice Douglas' dissent in *Wright v. Rockefeller* contained observations that are fully applicable to all racial gerrymanders, whether benign or malignant (376 U.S. at 67):

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as

one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.

The notion that there is benefit to our society by deliberate compensatory racial districting proceeds from the premise that justice to disadvantaged racial minorities in the United States can be achieved if more members of such minorities are elected to public office. It is assumed that this can best be accomplished by now maximizing the voting power of racial minorities so that their bloc votes will elect their representatives. These suppositions are erroneous in various respects.

B. Racial Prejudice Can Be Overcome

The first erroneous assumption is that racial and ethnic prejudices are, and will forever be, the principal determinant of choice in the voting booth. On this ground, it is assumed that even in a jurisdiction like New York, where there is no history of exclusion of blacks from the political process, nonwhite legislators can be elected only in districts where nonwhite voters comprise a "viable majority." Rather than supporting this premise, the history of this country convincingly demonstrates the contrary. It was once believed that Italians, Irishmen or Jews could not possibly be elected to public office except where their ethnic groups provided solid voting blocs. Similarly, it was believed that religious or ethnic groups voted as a single unit.¹⁵

¹⁵ In October, 1832, "Eighty-Five Israelites" had to write to *The Charleston (S.C.) Courier* to rebut the assertion that Jews were voting as a unit. The open letter read, in its entirety:

The meeting of Israelites, held on Saturday night [September

A most commonly held belief at one time was that no Catholic could ever be elected President. A charge of

29], was dissolved by an attempt to convert it into a meeting for party purposes. The subscribers unite to carry into effect the true object of said meeting.

WHEREAS, it is understood by the subscribers, belonging to both parties, that an impression has been produced upon the minds of a portion of our fellow-citizens, that the Israelites of Charleston are desirous of being represented as a *religious sect* in our State Legislature; and moreover, that a list or petition was put into the hands of the Chairman of the Executive Committee of the Free Trade and State Rights Party, for a representation in the State Legislature. A measure only to be known to be at once disclaimed and disavowed, as calculated to impair the confidence of the community in their independence, their personal pride and their sense of propriety. And, whereas, our political relations are identified in a common bond with our fellow-citizens, a sanction to such a course would indicate a desire on their part to impair the freedom of choice from among their fellow-citizens generally.—Therefore, we the subscribers agree to the following:

Resolved, We unite specially for the purpose of disclaiming, that the Israelites of Charleston have expressed a desire or intention to nominate any individual whatever.

Resolved, That we wholly disclaim any wish or intention to be represented as a peculiar community, and that we discountenance the idea of selecting any individual for office, either of profit or honor, upon the ground that such individual belongs to a particular sect, with the view of securing or of influencing the suffrages of such sect.

Resolved, That the perfect independence of the Israelites of Charleston, is beyond the control of any individual, it matters not to what sect or party he may be attached.

Resolved, That if any lists, from any motives whatever, have been drawn up, and handed about to secure the signatures of individuals, so as directly or indirectly to insist on, or to influence the nomination of any person from either party, such lists are neither sanctioned nor tolerated by us, and must have proceeded from persons not authorized by the will or wish of the undersigned.

Resolved, That while we are sensible there are gentlemen among

“Rum, Romanism and Rebellion” may have affected the election of 1884, but—without “benign” governmental manipulation of electoral districts—the bogey of national religious prejudice was dispelled in 1960.

There is ample proof today of the falsity of the premise that black candidates have a chance of being elected only where there is a comfortable majority of black voters. Massachusetts is, of course, a striking example. Of a total voting age population in 1970 of 3,955,000, the number of voting age blacks was 115,000—a percentage of 2.97. Yet Massachusetts has elected a black United States Senator. A 1974 study by the Joint Center for Political Studies produced a list, which is reprinted on the following page, of thirteen large American cities (over 50,000 people) with black populations of more than 20 percent which have elected black mayors.

us who would do no discredit to any station public or private, we will not support any man for office who is not selected by the public for himself, his character and his talents.

Schappes, *A Documentary History of the Jews in the United States*, 185-187 (1971).

City	Total Pop.	Total Black Pop.	% of Pop. Black	Total VAP	Black VAP	% of Black VAP
Berkeley, Calif.	116,716	27,421	23.5	95,804	19,397	20.2
Compton, Calif.	78,611	55,781	71.0	46,022	30,375	66.0
Richmond, Calif.	79,043	28,633	36.2	54,821	17,272	31.5
Atlanta, Ga.	496,973	255,051	51.3	354,642	167,796	47.3
E. St. Louis, Ill.	69,996	48,368	69.1	44,654	28,324	63.4
Gary, Ind.	175,415	92,695	52.8	115,209	57,212	49.7
Detroit, Mich.	1,511,482	660,428	43.7	1,072,953	423,032	39.4
Pontiac, Mich.	85,279	22,760	26.7	56,538	13,385	23.7
East Orange, N.J.	75,471	40,099	53.1	57,897	27,244	47.0
Newark, N.J.	382,417	207,458	54.2	253,236	123,093	48.6
Raleigh, N.C.	121,577	27,594	23.0	89,872	19,150	21.3
Cincinnati, Ohio	452,524	125,070	27.6	326,882	79,829	24.4
Dayton, Ohio	243,601	74,284	30.5	175,436	47,593	27.1

As Judge Frankel noted, Los Angeles—with a black population of only 18 percent—is an even more striking illustration (Pet. App. 44a). If there were validity to the premise on which the Department of Justice and the New York Legislature proceeded—*i.e.*, that if the total nonwhite population of an electoral district is less than 65 percent, the votes of nonwhites are necessarily submerged—all of these cities other than East St. Louis should always have elected whites.

C. Blacks Can Be Effectively Represented by Whites

The second invalid premise is that only nonwhite legislators are able to represent nonwhite voters. What reason could there be for the Department of Justice's view—communicated explicitly to the New York Legislature—that a nonwhite population percentage of 61.5 in a particular district is not "substantial" enough (App. 98-99, 105) to meet constitutional requirements? This assertion can only be based on a belief that a solid block of nonwhites is needed to achieve effective representation for the majority inhabitants of that district because otherwise a white legislator might be elected. But this assumes that a white legislator representing a district that is 61.5 percent nonwhite would disregard the interests of a majority of his constituency—a totally unrealistic assumption.

To be sure, there may be extreme situations where black and white residents in a particular community are so polarized that voting is done entirely along racial lines and, as a consequence, white representatives, if elected, can be expected to ignore the interests of the blacks who have voted against them. This extraordinary circumstance appears to have been true in *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975),

which involved a Louisiana town of approximately 5000 people, slightly more than half of whom were black. The record showed a history of total racial segregation, and it was established that "with one recent and fortuitous exception, no black has ever been elected to municipal office . . ." 515 F.2d at 623. The court found that there had been "inexcusable neglect of black interests" by the white elected officials of the municipality (515 F.2d at 623-24).¹⁶

The unusual facts of *Wallace* are a far cry from the situation in Brooklyn. Can a white New York legislator, representing a district which is more than half nonwhite, in a county where seven of 22 assembly districts are majority nonwhite, refuse to render "effective representation" for his black constituents? No such allegation has been made and none could be. Indeed, the history of civil rights legislation in New York—which enacted laws prohibiting racial discrimination in employment, housing and public accommodations well before the federal Civil Rights Act¹⁷—demonstrates that the interests of nonwhites in the State were represented in the legislature well before there were substantial numbers of black or Chicano legislators.

¹⁶ Similar facts—though not as extreme—appeared in the record of *White v. Regester*, 412 U.S. 755, 767, 769 (1973) where the organization in control of the local Democratic Party in Dallas County "did not . . . exhibit good-faith concern for the political and other needs and aspirations of the Negro community" and where the "Bexar County legislative delegation . . . was insufficiently responsive to Mexican-American interests."

¹⁷ N.Y. *Civil Rights Law* §§ 40, 42, 43, (McKinney 1948), §§ 18-a to 18-e, 40-e, 40-d, 40-f, 41, 44 (McKinney Supp. July 1974).

D. Residential Patterns Determine a District's Racial Composition

A third false premise relates to the effect of residential patterns on the facile statistics relied upon by proponents of benign racial districting. The majority below noted, for example, that Kings County was 35.1 percent nonwhite and inferred, from this figure, that it was appropriate that three of the state senate districts—30 percent—contain "substantial nonwhite population majorities." It observed that this percentage was "slightly less minority concentration districts than the percentage of nonwhite voters in the county" and made the same observation regarding the parallel figures relating to the state assembly (Pet. App. 27a-28a, n. 21). This comparison fails to take account, however, of the fact that electoral districts are contiguous geographical units, and that residential patterns could not—other than by what Judge Frankel termed "wild accident" (Pet. App. 26a)—match the desired percentages of white and nonwhite voters. The Bedford-Stuyvesant area of the county is, for example, well known as a large nonwhite area. To the Department of Justice, its overwhelmingly black population constitutes "undue concentration" of a minority race. But by the very nature of a regional election-district system, as contrasted with state-wide proportional representation, districts will vary in minority-race population depending on residential patterns.

The fallacy of these comparative statistics—also relied upon by the NAACP (Br. in Opp. 5)¹⁸—is graphically illustrated by the Department of Justice's helplessness in dealing with the claim made to it in 1974

¹⁸ "Br. in Opp." refers to the respondent-intervenor's Brief in Opposition to the Granting of a Writ of Certiorari filed in this case.

by Puerto Rican groups. It is conceded that 10.4 percent of the population of Kings County is Puerto Rican, and this should mean, by a parity of reasoning, that one-tenth of the county's assembly districts (*i.e.*, at least two) and one-tenth of its senate districts (*i.e.*, one) should have "viable" Puerto Rican majorities. But the Department of Justice was unable to hypothesize even a single contiguous district which could be "safely" Puerto Rican, and it admitted that the 1974 reapportionment submerged the Puerto Rican vote even more than did the 1972 districting (App. 295-296). This was all justified, however, on the ground that Puerto Rican residents of Kings County lived in an area "forming a corridor" which made it impossible to devise a Puerto Rican district (App. 296).

E. Perpetuation of Past Discrimination Is Not the Problem

The final erroneous assumption is that in voting there is a "residual effect" of "past discrimination" that warrants some affirmative race-conscious relief. We are able to conceive of no set of facts where the application of racially neutral criteria cannot provide a total remedy for any "past discrimination." As Judge Frankel observed, "If people have been forced in or out because of race, then, of course, the fences must be torn down and the districts in this manner redrawn lawfully. That is, the forbidden use of race must be overcome by some condign remedy" (Pet. App. 46a).

Racial discrimination in school assignment, housing availability and employment opportunity all have continuing effects beyond any period of active discrimination on account of race. The decisions of this Court relating to the remedial phase of school desegregation con-

cern the task of dismantling a dual school system and turning it into a unitary system. It has not proved to be enough, in the process of school desegregation, to say to students in formerly black and formerly white schools that they may now attend school together. *See, e.g., Green v. County School Board*, 391 U.S. 430 (1968). Nor has the assignment of black faculties to black schools and white faculties to white schools been remedied by declaring that there are no more black or white schools. *E.g., United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969). In each of these instances, the effects of racial segregation have endured beyond the time when it was declared unlawful, and only affirmative remedial action—requiring race-conscious decisions—provides an effective remedy.

The same is true of employment and housing. White employees build up seniority during the time that they are discriminatorily hired and promoted in preference to blacks. Simply opening the door to blacks may result in perpetuation of a seniority scale that was improperly initiated. *E.g., Local 53, Asbestos Workers v. Volger*, 407 F.2d 1047 (5th Cir. 1969). Corrective or compensatory action might, in such cases, be deemed appropriate. And the same approach might be thought to justify benign race-consciousness in housing, if segregated residential patterns develop from years of active racial discrimination. People do not move from their homes overnight, and a judicial decree cannot, in and of itself, undo the effects of past conduct.

An election, on the other hand, is a single event occurring at regular intervals. If the election of 1972 was affected by improper racial districting, the remedy is to conduct an election in 1974 in which the districts are properly drawn according to neutral criteria. Tip-

ping the 1974 scales in favor of black voters does not compensate for an election improperly weighted towards whites two years before. In fact, if that is a proper corrective, what should happen in 1976? Should a racial gerrymander in favor of whites be designed to compensate for the 1974 tilt to blacks?

The NAACP—respondent-intervenor here—views this case as presenting the question of whether districting may be “designed to overcome the discriminatory effect of an earlier districting plan” (Br. in Opp. 2). But even if one were to accept all the exaggerated and inflammatory allegations made by the intervenors (and *not* accepted by the Department of Justice) and one were to assume, on this basis, that “a majority of blacks and Puerto Ricans in Kings County were gerrymandered into districts where a black or Puerto Rican candidate could not be elected” (Br. in Opp. 4),¹⁰ what “residual effect” does this racial gerrymander have once it is declared unlawful and the county is reapportioned by neutral non-racial criteria? Is a benign racial gerrymander or a benign quota a useful or desirable means of correcting what has happened—or is it just an aggravation of the wrong?

F. Private Racial Prejudice Is Encouraged

The majority below compared the need to “offset previous race or color discrimination” in the voting area with remedies judicially recognized in the areas of education, housing, grand jury selection and employment (Pet. App. 26a-27a). In so doing, it overlooked one fundamental difference that overshadows

¹⁰ Although one wonders, again, whether this confident assertion of foreordained results might not yield somewhat to the experience of Senator Brooke and Mayor Bradley.

whatever parallels may be thought to exist. In the electoral process, the ultimate decision must be a private one. Government officials draw geographic lines and, if constitutionally permitted, they may include or exclude individuals or groups in an effort to structure a district so as to secure the election of a black legislator or a Republican or a Catholic. But it is the electorate, and not the Legislative Committee on Reapportionment, that selects the individual who will represent the district. And it is surely contrary to the letter and spirit of the Constitution and to firmly entrenched public policy for government officials to encourage that electorate to choose its representative exclusively or primarily on the basis of color, creed or ethnic affiliation. Indeed, even the majority of the court of appeals recognized this important principle when it observed that “[t]hankfully, we seem more and more coming to the day when the American voters vote *person* or *party* or *issue* and not *color* or *race* or *sex*” (Pet. App. 27a, n.20; emphasis added).

In the fields of public education, housing, grand jury selection and employment, private choice is not as critical as in the electoral process, and the effect on that private choice of flagrant race-consciousness by official action is not as destructive. In the voting booth—more than anywhere else—it is essential, for the survival of our society, that racial differences be surmounted, not exaggerated or intensified. Precisely because it was imperative that the state not “induce racial prejudice at the polls,” this Court unanimously struck down, more than ten years ago, a local statute that required candidates to be identified by racial designation on all ballots. *Anderson v. Martin*, 375 U.S. 399 (1964). That mechanism would have operated, the

Court observed, as a help to black candidates in districts where black voters predominate (375 U.S. at 402), but the injection, by official acts, of race as a factor in a voter's choice was deemed objectionable *per se*, no matter who benefits.

Even "benign" racial apportionment communicates to black and white residents of the gerrymandered district the message that race should be an overriding concern in their voting decision. Nonwhite voters in an election district that has deliberately been carved out so that they number 65 percent rather than 61.5 or 63.4 percent can only assume that their government wants and expects them to vote along racial lines. The official encouragement to racial prejudice at the polls is as telling here as when racial designations are attached to the names of the candidates. This is demonstrated by the testimony introduced during the hearing on petitioners' motion for a preliminary injunction. Abe Gerges, a district leader, testified as follows (App. 58):

Q. How would you describe the factors that go into the decision of the Hasidic community, that is what factors determine whom they are to support?

A. Well, the Hasidic community is a small, relatively small community and covers the 57th Assembly District. They are involved with people of all ethnic backgrounds, and particularly sit on committees, and here I am referring to Albert Friedman who sits on the board with people of all nationalities, black, white, Spanish et cetera.

I think over the last several years the people of the 57th Assembly District have learned to work together, and I think this is really the injustice that we are talking about here today, it is

that the people having worked together now are told that they can no longer work together because they are of a certain race.

Q. Would this in your view lead to encouraging voting along racial lines?

A. Absolutely, it is pitting, it is pitting one race against another race, which I do believe was not the intention of the law suit which was filed and successfully taken by the NAACP.

Q. So is it that by the action that was taken in dividing up this community because of racial factors, therefore, members of that community are being encouraged to vote for members of their own race?

A. Well, I think, I think that might not be what is on the top of the lever, that is what the talk is around that we hear, we are being at this point told that we must have someone of a certain race representing us as opposed to having a good man representing us.

Leopold Lefkowitz, a plaintiff in this action and a member of the Hasidic community, testified (App. 87):

Q. Is it your view that the lines that are drawn will encourage voting on the basis of race, the lines that have been presently drawn?

A. I think that this will bring out, especially after Mr. Schnapper's position here, this will bring out the racial issue, which we didn't, which we were fortunate in not having it in our community and I am very much afraid that this will become a racial issue now.

Q. Because of the lines which have been drawn on this basis?

A. Yes, and because the lines were drawn on this basis on the recommendation from Mr. Schnapper.

II

REMEDIAL RACIAL DISTRICTING WAS UNJUSTIFIED BECAUSE THERE WAS NO FINDING OR EVIDENCE OF PAST DISCRIMINATION REQUIRING ANY REMEDY

The majority of the court of appeals sustained the racial gerrymander challenged in this case on the ground that it was needed "[t]o correct an invidious discrimination in favor of white voters and against nonwhites which had occurred in Kings County . . ." (Pet. App. 31a). But there was absolutely no finding by any executive, administrative, legislative or judicial body that there had been any such "invidious discrimination" and there was no probative evidence in the record—substantial or otherwise—to permit an inference that racial discrimination justifying a remedy had, in fact, occurred.

There is a recital in the NAACP's Brief in Opposition in this case of various assertions regarding districting in Kings County that were made by the NAACP to the Attorney General in its challenge to the 1972 reapportionment (Br. in Opp. 3-4). These assertions were contained in a lengthy letter sent to the Department of Justice (App. 204-221), and they were, quite clearly, not credited by the Department. The letter of April 1, 1974, from Assistant Attorney General Pottinger to New York officials, advising that the 1972 reapportionment was disapproved under Section 5 of the Voting Rights Act, did *not* find that there had been deliberate racial gerrymandering or even that nonwhite residents of the county or of particular legis-

lative districts had been denied the opportunity "to enter into the political process in a reliable and meaningful manner." *White v. Regester*, 412 U.S., 755, 767 (1973). The Department of Justice's finding was based entirely on its own appraisal of the "concentration" and "diffusion" of nonwhites among the legislative districts in Brooklyn. We quote the relevant findings in full, and emphasize, by our own italicization, the tentative and uncertain characterizations which the intervenor-respondent and a majority of the court below have turned into findings of "invidious discrimination" (App. 15):

Senate district 18 *appears* to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population *appears* to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan, *we know of no necessity for such configuration and believe other rational alternatives exist.*

The denial of the request for approval was couched in the following terms (App. 14-16; emphasis added):

[O]n the basis of all the available demographic facts and comments received on these submissions *as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color*, we have concluded that the proscribed effect *may* exist in parts of the plans in Kings and New York Counties.

* * * * *

On the basis of our findings, therefore, we *cannot conclude*, as we must under the Voting Rights

Act, that those portions of these redistricting plans *will not have the effect* of abridging the right to vote on account of race or color.

The New York Legislature did not agree even with the guarded double-negative finding made by the Department of Justice—*i.e.*, that, given the State's burden of proof, it could not conclude that the reapportionment would not have a racial effect on the right to vote. The report of the Joint Legislative Committee on Reapportionment stated (App. 177):

While the Joint Legislative Committee on Reapportionment does not subscribe to the ruling of the Justice Department as expressed in the April 1 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time require that new legislation be enacted to satisfy immediately the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974.

That same report concluded with the following language (App. 188-189):

The statutory authority granted to the Justice Department, exercised at a time immediately prior to the general election, effectively made it impossible for the State of New York to seek judicial review. In this instance, the State, while being afforded a right to judicial review is unable to secure a remedy due to the immediacy of the election. It is the opinion of the Committee that if judicial review was available within the time permitted, the existing apportionment would be held valid. . . .

Testimony introduced at the hearing on petitioners' request for a preliminary injunction corroborated that

(1) there was no affirmative finding by the Justice Department of actual racial discrimination and (2) the New York State authorities disagreed totally with the Justice Department conclusions but had no time to subject those conclusions to judicial review (App. 108-109):

Q. Earlier today I showed you, I believe you said you hadn't seen them, but I showed you the complaint in this case and specifically Paragraph 13 where it is alleged that the conclusion of the Attorney General or Mr. Pottinger was based not on any finding of evidence or lack of evidence tending to establish that there was purposeful racial gerrymandering designed to reduce black representation in the State Legislature when the 1972 reapportionment and the 1966 reapportionment was drawn.

From your understanding of conversations with attorneys in the Department of Justice, is that allegation true?

A. Yes. They said the effect was to dilute the minority representation.

Q. That is Paragraph 14?

A. Yes.

Q. Paragraph 15 says the Attorney General did not rest on any finding, evidence or lack of evidence, tending to show there was a history of past official discrimination against the black electorate of Kings County only corrected by deliberate maximum of black voting strength in elections held in '74. Is that also true?

* * * * *

A. At no time did any member of the Attorney General's staff indicate their decision was based on any past history of discrimination.

This record is a far cry from those on which this Court has found racial discrimination in apportionment, and there is every reason to believe that if the case had been fought before the New York authorities, they would have prevailed. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), for example, this Court reversed a conclusion that multi-member districting in Indiana was racially discriminatory and diluted the voting power of ghetto residents. Surely it was as possible in Marion County, Indiana, as in Kings County, New York, to devise an apportionment scheme that would have given more voting power to poor blacks. The record in *Whitcomb v. Chavis* established "no necessity" for multi-member districting and, as the Department of Justice found here, "other rational alternatives" existed. Yet this Court recognized that the burden of establishing racial malapportionment is on the party asserting that the apportionment is invalid. It said, in language fully applicable to the pre-1972 record in Kings County, "We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats." 403 U.S. at 149-150.

White v. Regester, 412 U.S. 755 (1973), on the other hand, involved a markedly different record. In that case, this Court relied on a district court's findings of (1) "official racial discrimination in Texas," (2)

very few blacks who had ever been in the county's legislative delegation, (3) lack of "good-faith concern for the political and other needs of the Negro community," (4) the use of "racial campaign tactics," and (5) the general efforts to exclude the black community from participation in the only meaningful primary (412 U.S. at 766-767). None of these highly probative factors can even be remotely alleged as to Kings County, New York, and their absence makes it impossible to conclude that there has been "invidious discrimination" in the past which requires corrective measures today.

Indeed, the only basis in the record or anywhere else for invoking the Voting Rights Act at all as to Kings County is the decision in *Torres v. Sachs*, 381 F.Supp. 309 (S.D.N.Y. 1974), that Puerto Rican natives are entitled to bilingual ballots. Ironically, the 1974 reapportionment challenged here did not increase the voting power of Puerto Rican residents of Kings County; it had the effect of spreading their communities among more legislative districts in each of which they exercised reduced proportional voting strength. Plainly, then, the 1974 apportionment did not correct any "invidious discrimination" against Puerto Ricans.

A comparison of the facts here with those in two cases now pending before the Court will show how totally devoid of proof of discrimination this record is. In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), cert. granted, 422 U.S. 1055 (1975), pending *sub nom.*, *East Carroll Parish School Board v. Marshall*, No. 73-861, a Louisiana county where there had been, until recently, substantial racial exclusion from voting rolls and where a dual school system had been maintained, changed from a ward election system to at-

large voting throughout the county. Nearly 60 percent of the county's residents were black, according to the 1970 census, but blacks were slightly less than half its voters. An *en banc* court of appeals, relying on a history of total racial segregation in the county until 1957 and a refusal to allow blacks to register to vote until 1962, reversed a district court judgment sustaining the at-large election. The court rejected evidence that, after entry of the district court's order, three blacks were elected in at-large elections and it found not dispositive the additional fact that there was no proof—as there had been in *White v. Regester* (see n. 16, *supra*)—that the white legislators had been “particularly insensitive to the interests of minority residents.” 485 F.2d at 1306. Six judges dissented on the ground that *White v. Regester* had been misapplied, and this Court has now granted certiorari and heard argument.

If the simplistic arithmetical standards used here by the Justice Department were applied to the facts of *Zimmer*, the change to at-large voting would immediately be invalidated—whether or not there was a history of segregation and racial discrimination, whether or not black legislators had been elected, whether or not past legislatures had been hospitable to the needs of the black community. It would be enough simply to say that there is less opportunity to elect black legislators, that there is “no necessity” for an at-large plan, and that “other rational alternatives exist.”

The same reasoning would, *ipso facto*, invalidate the New Orleans councilmanic redistricting involved in *Beer v. United States*, 374 F. Supp. 357 (D.D.C. 1974), *prob. jurisd. noted*, 419 U.S. 822 (1974), *restored to*

the calendar for reargument, 421 U.S. 945 (1975), *pending as No. 73-1869*. That record, too, presented a lengthy history of official racial discrimination in “all facets of everyday life in New Orleans” (374 F. Supp. at 374, 395), indifference by elected city officials to the desires and needs of black citizens (*id.* at 375, 398), devices designed to exclude blacks from the registration rolls (*id.* at 374), and proof of polarized communities and racial bloc voting (*id.* at 375). If the standard used here by the Department of Justice and by the majority below in determining that there was “invidious discrimination” requiring “corrective action” were applied in *Beer*, all these factors would be irrelevant. It would suffice, to invalidate both New Orleans districting plans, that the court find—as it did—a mathematical reduction in black voting power from a statistical “natural potential.” See 374 F.Supp. at 389. The *Beer* decision now *sub judice* here found (*ibid.*):

deviations [which] are the consequence of fragmentation of the black vote for the five district seats and its compartmentation in districts so constructed that it attains a majority status in only one, in cooperation with the phenomena of at-large elections for the two remaining seats, and majority- and multiple-vote prerequisites to candidacy for any seat.

It may be that this Court will sustain the district court ruling in *Beer*. If it does, we believe essential elements in that decision will be the history of past practices in New Orleans which we have previously enumerated.²⁰ That history did not exist in Kings

²⁰ The United States' brief in *Beer* relied heavily on these factors, and the Solicitor General noted specifically that the district's court's findings were not based “merely on these statistics” but on residual

County and it totally distinguishes this case. The three-judge district court in *Beer* relied heavily on that history throughout its opinion and again in its conclusion. 374 F.Supp. at 400-401. If, on the other hand, *Beer* is not sustained, it follows, *a fortiori*, that there is no proof on this record of invidious racial discrimination justifying "corrective action" under the Voting Rights Act or any other statutory or constitutional authority.

We conclude this brief discussion of recent and pending cases involving the Voting Rights Act with one *caveat*. The respondents may seek to shield the 1974 New York districting by erecting around it the presumptions of validity that surround the usual legislative apportionment. They may argue—as the majority below sought to do (Pet. App. 27a-28a)—that unless the standards of *Whitcomb v. Chavis*, *White v. Regester* and *City of Richmond v. United States* are satisfied by the petitioners, the 1974 reapportionment withstands constitutional challenge. This argument ignores what really happened in this case and stands the remedy of the Voting Rights Act and the Fifteenth Amendment reapportionment decisions on its head.

If, in due course, the New York Legislature had held legislative hearings and made legislative determinations regarding the proper districting in Kings County, and if the outcome of that legislative process were challenged as racially discriminatory by white voters in Kings County, the standards of the reapportionment and Voting Rights Act cases would, of

effects of pervasive racial discrimination. Brief for the United States, No. 73-1869, pp. 19-23.

course, apply. But this case involves no legislative judgment of any kind other than the decision that it was better to yield to the seemingly unlawful demands of the Department of Justice than for Kings County to have no 1974 election at all. Moreover, unlike the cases we have been discussing, this record is one in which there is overt racial motivation on the part of the legislature. Hence the first of the two disjunctive criteria announced in decisions under the Fifteenth Amendment applies here. See p. 25, *supra*.

Nor, for this reason, can the respondents take any comfort from the disallowance of the 1972 redistricting by the Department of Justice. Even granting that no private party may seek review of that decision under Section 5 of the Voting Rights Act—a proposition that leaves affected citizens totally remediless against the use of unconstitutional standards by federal officials if state officers find resistance to such illegality too expensive or time-consuming—the disallowance does not amount, in and of itself, to affirmative proof of "past invidious discrimination." Because of the peculiar shift of burden of proof resulting from 28 C.F.R. § 51.19, sustained in *Georgia v. United States*, 411 U.S. 526 (1973), over the vigorous dissent of three Justices, a local government's apportionment may be rejected on the basis of "evidence [that] is in equipoise" (411 U.S. at 545, White, J., dissenting). But such evenly balanced proof (or a total gap in the evidence, which would lead to a similar conclusion) is not equivalent to an affirmative finding of past discrimination that would alone justify remedial racial districting.

III

THE RACIAL QUOTA REMEDY IMPLIED IN THE ADVICE
OF THE DEPARTMENT OF JUSTICE AND EXPLICITLY IN-
VOKED BY THE NEW YORK LEGISLATURE BORE NO
RATIONAL RELATION TO ANY ALLEGED PAST DIS-
CRIMINATION

We come, finally, to the question discussed fully in Judge Frankel's dissent—whether any preexisting wrong inferable on this record could “justify, or render congruent, a presumptively odious concept of racial ‘critical mass’ as a principle for the fashioning of electoral districts” (Pet. App. 33a). Judge Frankel observed that no court had found that the 65 percent quota was “suited as a remedy for the unsurmounted objections of the Attorney General to the 1972 lines” (Pet. App. 40a), and he concluded, from his own canvass of possible bases for such a quota, that “there is no semblance of justification” for it (Pet. App. 50a). That conclusion—clearly supported by the record—is the most narrow ground for reversing the decision below and requiring the New York Legislature to reapportion these districts anew without consideration of this invidious racial criterion.

In *Milliken v. Bradley*, 418 U.S. 717 (1974), this Court reversed a remedy devised by a district court which had substantial evidence before it of racial segregation in public schools attributable to official policies and practices. The Court's view was that the remedy a federal court may utilize to correct past racial segregation may not substantially exceed, in scope, the constitutional violation that has been committed. The Court quoted from its opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), and held that “federal remedial

power may be exercised ‘only on the basis of a constitutional violation’ and ‘[a]s with any equity case, the nature of the violation determines the scope of the remedy.’ ” 418 U.S. at 738.²¹

Whatever limitation there is to the “federal remedial power” that may be exercised by a court carrying out judicial functions under Article III of the Constitution, after a full adversary proceeding in which past segregation is established, must apply, *a fortiori*, to the “federal remedial power” of middle-echelon Executive Branch personnel (such as Assistant Attorneys General) who, without adversary proceedings or oral arguments, issue adverse conclusions based upon gaps in the *ex parte* presentations made to them. In other words, if a district judge could not have imposed a 65 percent racial districting quota on the New York Legislature if a record before him contained the same evidence of alleged racial discrimination as was presented here to the Department of Justice, it was no more permissible for that Department to suggest to the New York Legislature that this remedy be used in the discussions undertaken pursuant to the Voting Rights Act. In each instance, it is federal power that is being exercised over a subject of intrinsically local concern. If it would be an abuse of that power for a judge to exercise such authority, it is surely impermissible for the same kind of action to be taken by an executive officer—against whose arbitrariness there is far less legal safeguard.²²

²¹ Later in its opinion (418 U.S. at 744), the Court again described as a “controlling principle” the rule “that the scope of the remedy is determined by the nature and extent of the constitutional violation.”

²² Because the New York authorities acted at the insistence of the Department of Justice, we joined the Attorney General as a de-

Nor can the intervenor-respondent take refuge behind the fact that this case formally challenges action taken by the New York Legislature. It is clear from the record that the legislature was applying no independent legislative judgment and that the 65 percent quota was not based on any legislative factfinding or other proceeding involving legislative evaluation or expertise. The New York Legislature was forced to do what it did by the demands of the Department of Justice based upon findings with which the legislature totally disagreed. Consequently, it cannot be said that the 65 percent quota is entitled to the respect of a legislative determination. It is, entirely, federal executive *fiat*—whether expressed outright or communicated by nods of approval when the magic figure was mentioned during negotiations.

Is there any rationality to the 65 percent figure? If one assumes that the objective is to maximize “nonwhite” voting power if “nonwhites” vote as a bloc, the 65 percent figure might be a means of achieving this goal. If a district has many more nonwhites than 65 percent, their votes would be wasted if substantially everyone voted along white-nonwhite racial lines. If it has a nonwhite population substantially less than 65 percent, the nonwhites may not be able to bring enough

fendant in this action. We believe he is properly a party to the suit by analogy to decisions such as *Aguayo v. Richardson*, 473 F.2d 1090, 1102 (2d Cir. 1973); *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611, 622 (E.D. Va. 1973); *aff'd*, 481 F.2d 1280 (4th Cir. 1973); *Hough v. Seaman*, 357 F.Supp. 1145 (W.D. N.C. 1973), *aff'd*, 493 F.2d 298 (4th Cir. 1974). In all these situations, federal officers caused local officials to deprive individuals of federal constitutional rights under color of State law, and the courts upheld joinder of the responsible federal officers as defendants.

people to the polls—given their lower registration percentages and the higher proportion of minors in the nonwhite population—to produce a majority. Hence the 65 percent figure might be an explainable statistic for maximizing nonwhite voting strength. We emphasize “might be,” because there is no evidence in the record actually to support use of this particular figure. It rests on no proof tested by adversary process and on no legislative judgment.

Moreover, there are several flaws in the application of that percentage to this case. *First*, neither the Constitution nor any principle of federal law justifies nonwhite “maximization” as a legal objective. The only permissible goal is to remedy past discrimination. And if no discrimination had ever existed, nonwhite voting power would have been neither maximized nor minimized; it would simply have stood where neutral districting would have placed it. And neutral districting would not have fixed the nonwhite population of the 57th Assembly District at precisely 65 percent.

Second, the classification of all voters in “white” and “nonwhite” categories is particularly irrational and obnoxious. To young lawyers in Washington, D.C. who are unable to locate Prospect Park in Brooklyn or to find Williamsburgh on a map of Kings County (App. 177), racial distinctions in New York may seem describable as white *vel* nonwhite. Puerto Ricans and blacks living in New York City see it differently, as the separate Puerto Rican claims made to the Department of Justice indicate (App. 239-40, 295-97). See the discussion of this question in Judge Frankel’s dissent (Pet. App. 39a, n. 4). And, as the petitioners’ witnesses testified in the district court, the Hasidic community often viewed its interests as best represented

by members of other races or other religions. The short of the matter is that if, as the NAACP contends, blacks have been the victims of racial gerrymanders in Kings County in the past, corrective action (if that is appropriate in elections—see pp. 37-39, *supra*) should give blacks voting opportunities proportional to the 24.7 percent of the county-wide population that is black. There is no basis for remedying that discrimination by lumping blacks and Puerto Ricans together and limiting the percentage of those who are neither black nor Puerto Rican to 35 percent.

Third, the very inflexibility of the 65 percent figure refutes any claim that it was intended—as the NAACP has argued—as an innocuous measure of whether “the discrimination found by the Attorney General had been eliminated” (Br. in Opp. 7). If it were merely a helpful guideline, the New York legislative committee would not have rejected a 63.4 percent figure as inadequate (App. 115). Plainly it was viewed as a nonnegotiable minimum and must, accordingly, be judged by its validity in that guise.

Finally, for reasons similar to those discussed in an earlier portion of this brief and fully explicated by Judge Frankel in his dissenting opinion, a racial quota in districting is particularly irrational. Residential patterns—which would dictate the racial compositions of truly neutral districting—do not lend themselves to fixed racial-quota districting. And if one may legitimately district by quotas along racial lines, why not quota districting for religious and ethnic groups as well? Could a court, administrative agency or legislature conclude that certain ethnic groups had been underrepresented and are, therefore, entitled to augmented quotas today? There is, as Judge Frankel ob-

served, no end to the “dizzying mass” of cognizable groups which deserve treatment equal to Brooklyn’s “nonwhites.”

CONCLUSION

This case involves an apportionment that was unconstitutional because it drew purposeful racial lines, was justified by no past history of discrimination, and implemented a wholly irrational and unsuitable districting standard. One election has already been conducted under this apportionment, to the injury of a group of citizens who suffer serious discrimination in many other aspects of daily life. For the reasons elaborated in this brief, we believe the 1974 apportionment must be declared invalid, and the district court instructed to implement, for the coming election, either lines improperly disapproved by the Department of Justice or some other districting that does not subject the plaintiffs to a racial quota.²³

No matter from what vantage point it is viewed, this case involves a racial quota. The evils of such a legal standard were eloquently described by the late Professor Alexander Bickel and Professor Philip Kurland, who together authored an *amicus curiae* brief for this Court in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), a case presenting much closer and more difficult issues—though related to those presented here:

A racial quota creates a status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color

²³ Mr. Seclaro testified that he had devised one plan that kept the Hasidic community together in the 57th Assembly District with a nonwhite population percentage of 63.4. This plan, he said, could be drawn up in 2-3 days (App. 125).

or parental origin. A racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice . . . The history of the racial quota is a history of subjugation not beneficence.

The evil of the racial quota lies not in its name but in its effect. A quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant, politically, economically, and socially.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

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EL RODAK, JR., CLERK

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC.,
et al.,

Petitioners,

v.

HUGH L. CAREY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE RESPONDENTS

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IN THE
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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BRIEF FOR STATE RESPONDENTS

Question Presented

Did the enactment of Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, insofar as they altered assembly and senate district lines in the area commonly known as Williamsburgh in Kings County to satisfy objections expressed by the Attorney General of the United States to the prior district lines pursuant to § 5 of the Voting Rights Act of 1965, as amended, violate petitioners' rights under the Fourteenth and Fifteenth Amendments?

Statement

A.

The Complaint

Plaintiffs are a group of Jewish organizations and individuals speaking for the Hasidic community in the Williamsburgh section of Brooklyn, New York. The complaint asserts that the Hasidic community in Williamsburgh has for the past twenty-five years been included within one State senate district and one State assembly district (App. 6).¹ Under the 1972 reapportionment (Chapter 11 of the Laws of 1972), the Hasidic community of Williamsburgh was included within the 57th State Assembly District and the 17th State Senate District.

On April 1, 1974, the Attorney General of the United States, who was named as a defendant in this action, acting through Assistant Attorney General J. Stanley Pottinger, issued a determination stating that the assembly and senate district lines in Kings County established by Chapter 11 of the Laws of 1972 as well as the congressional district lines in Kings County established by Chapters 76, 77 and 78 of the New York Laws of 1972 were invalid under § 5 of the Voting Rights Act because the purportedly over concentration of non-whites in certain districts were considered by the United States Attorney General to produce a racially discriminatory effect (App. 14-16). The effect of the United States Attorney General's determination of April 1, 1974 under § 5 of the Voting Rights Act was to preclude the use of the district lines that were not approved by the Attorney General.

To satisfy the demands of the United States Attorney General, the New York State Legislature on May 29 and 30, 1974 redrew the assembly, senate and congressional district

¹ "App." refers to the Appendix filed by petitioners.

lines in Kings County. Laws of 1974, Chapters 588, 589, 590, 591 and 599.

Plaintiffs contend that in enacting the 1974 redistricting statutes, the State of New York violated plaintiffs' rights, purportedly secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment and by the Fifteenth Amendment, by dividing the Williamsburgh Hasidic community into two assembly districts (the 56th and 57th) and into two senate districts (the 23rd and 25th) since such divisions were allegedly only made necessary by the race conscious standards imposed by the United States Department of Justice.

The complaint sought (1) injunctive relief against the administration and implementation of the 1974 redistricting laws by the respondent Governor and other State officials and New York City Board of Elections; (2) a judgment against the Attorney General declaring that the standard under which he rejected the 1972 laws was unconstitutional; (3) declaratory and injunctive relief against the 1974 laws; and (4) injunctive relief against implementation of any redistricting plan other than that of 1972, or alternatively that established by the Judicial Commission appointed by the New York Court of Appeals in 1966² (App. 12-13).

B.

Background

Sections 4 and 5 of the Federal Voting Rights Act of 1965, as amended in 1970, 42 U.S.C. §§ 1973b, 1973c, provide that in any state or political subdivision thereof which

² In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), this Court held that New York's apportionment scheme violated the Fourteenth Amendment owing to population disparities between districts. In *In re Orans*, 15 N.Y. 2d 339, 206 N.E. 2d 854 (1965), the New York Court of Appeals established a Judicial Commission to draw up a new apportionment plan. The Commission's plan was approved in *In re Orans*, 17 N.Y. 2d 107, 216 N.E. 2d 311 (1966).

utilizes a test as a pre-condition for voting and in which less than 50% of persons of voting age voted in the 1968 Presidential Election, any changes in voting laws or procedures (including reapportionment plans) enacted since November 1, 1968 may not take effect until they have been approved by either the Attorney General of the United States or by the District Court in the District of Columbia.

The Counties of Kings, The Bronx and New York came within the purview of the Voting Rights Act upon the filing by the Attorney General of the United States on July 31, 1970 of a determination that the literacy requirement imposed by the State of New York (N.Y. Const., Art. II, § 1; N.Y. Election Law §§ 150, 168) constituted a "test or device" within the meaning of the Voting Rights Act,³ and upon the determination by the Director of the Bureau of the Census on March 27, 1971 that less than 50% of the persons of voting age residing in The Bronx, Kings and New York Counties voted in the Presidential Election of 1968.⁴

The Voting Rights Act permits a state or county that has become subject to its provisions to be exempted from the filing requirements of the Act by obtaining a declaratory judgment in the District Court for the District of Columbia adjudging that neither the purpose or effect of any test employed as a pre-condition for voting in the affected area was to deny or abridge any citizen's right to vote on account of race or color. The State of New York brought such an action on behalf of The Bronx, New York and Kings Counties on December 3, 1971. After a four-month investigation into election procedures in the three affected counties, the Justice Department consented to the entry of the declaratory judgment sought by the State of New York and the District Court on April 13,

³ 35 Fed. Reg. 12354 (1970).

⁴ 36 Fed. Reg. 5809 (1971).

1972 issued an order granting the State's motion for summary judgment exempting the three affected counties from the filing requirements of the Voting Rights Act, and denying a motion brought by the NAACP to intervene. *New York State v. United States*, D.D.C. Civil Action No. 2419-71 (1972) (unreported). The NAACP unsuccessfully appealed to this Court from the denial of its motion to intervene. *NAACP v. New York*, 413 U.S. 345 (1973).

In October, 1973, the Justice Department moved to reopen the declaratory judgment granted to the three affected counties on the ground that a decision by District Judge Charles E. Stewart in the Southern District of New York in the case of *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y., 1973), had held that the failure of the New York City Board of Elections to provide a Spanish translation of the ballot violated the rights of Spanish-speaking citizens living in New York City in contravention of the Federal Voting Rights Act.

The Justice Department's motion to reopen was granted by the three-judge District Court in the District of Columbia, without a hearing on the merits of the application, and on January 10, 1974 the District Court entered an order rescinding the previous declaratory judgment that had been granted to the State of New York and directed the State, on behalf of the three affected counties to comply with the filing requirements of § 5 of the Voting Rights Act. An application for a stay of that order was denied by the District Court. 65 F.R.D. 10 (D.D.C., 1974).

Subsequently, the State of New York moved for summary judgment to exempt the three affected counties from further coverage under §§ 4 and 5 of the Voting Rights Act. Affidavits in support of the State's motion were submitted by senior election officials in each of the three affected counties denying that there was any racially discriminatory application of New York's literacy requirement and further attesting to the actions that the New

York City Board of Elections had taken to encourage non-whites to register and vote. Also submitted in support of the State's motion for summary judgment was an affidavit from Assistant Attorney General George D. Zuckerman which annexed a copy of a letter from the Director of the United States Bureau of the Census attesting to the fact that the Census Bureau had included resident aliens in its determination of persons of voting age population in 1968, and an exhibit demonstrating that if resident aliens had been excluded from the determination of voting age population, more than 50% of the persons of voting age population in New York, The Bronx and Kings Counties would have participated in the Presidential Election in 1968 thereby bringing those counties outside of the application of the so-called trigger formula imposed by § 4(b) of the Voting Rights Act.⁵

The State of New York further argued that the sole reliance by the United States on the decision in *Torres v. Sachs*, *supra* as a basis for opposing New York State's exemption from the filing requirements of the Voting Rights Act was in error since the Voting Rights Act, as then written,⁶ did not require a Spanish-translation of the ballot.

On April 30, 1974, the District Court, without written opinion, denied the motion of the State for summary judgment and entered a judgment dismissing the action for declaratory judgment. An appeal taken by the State of New York from the District Court's orders of January 10 and April 30, 1974 resulted in the summary affirmance of such orders, without hearing, by this Court. *New York v. United States*, 419 U.S. 888 (1974).

The effect of the above proceedings has been to require the submission by the State of New York of all voting laws and procedures, including reapportionment plans, that have been enacted since November 1, 1968 to the Department of Justice insofar as they involve the Counties of The Bronx, Kings and New York. On April 1, 1974 the Department of Justice, in a letter from Assistant U. S. Attorney General J. Stanley Pottinger to State Assistant Attorney General George D. Zuckerman (App. 14-16), refused to approve changes in certain assembly and State senate district lines in Kings and New York Counties (based on Ch. 11 of the New York Laws of 1972) on the ground that while the purpose of those district lines might not have been to discriminate, the Department of Justice could not conclude that such lines "will not have the effect of abridging the right to vote on account of race or color."

With particular reference to the State legislative district lines in Kings County, the Pottinger letter observed:

"Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist." (App. 15)

⁵ See Jurisdictional Statement, pp. 25-28 in *New York State on behalf of New York, Bronx and Kings Counties v. United States*, October Term, 1973, No. 73-1740. It should be noted that the State of New York's contention that the trigger formula in § 4 of the Voting Rights Act should only apply to "citizens" of voting age, rather than "persons" of voting age, was accepted by Congress in the 1975 Amendments to the Voting Rights Act. Public Law No. 94-73 (July 24, 1975) amending 42 U.S.C. § 1973b(b), 89 Stat. 401.

⁶ In the 1975 Amendments to the Voting Rights Act, Congress, for the first time, required voting notices, forms, instructions and ballots to be in a minority language in certain circumstances. See 42 U.S.C. § 1973aa-1a(c) as added by Public Law No. 94-73 (July 24, 1975).

Under the provisions of § 5 of the Voting Rights Act, the Justice Department's ruling of April 1, 1974 prevented any election from taking place in Kings and New York Counties under the district lines that were not approved by the Attorney General of the United States.

While the State had the right to challenge the Justice Department's determination of April 1, 1974 by way of an action in the three-judge District Court for the District of Columbia under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the State was, as the majority opinion in the Court below correctly characterized, "under the gun" to satisfy the Department of Justice's objections. Not only was it highly unlikely that a declaratory judgment action challenging the Department of Justice's determination could be judicially resolved in time to permit candidates for public office to know the boundaries of the district lines in time to collect petitions for the 1974 primary,⁷ but there was also a pending three-judge District Court action brought by the NAACP to compel the State to enact new district lines in compliance with the Department of Justice's order. *NAACP v. New York City Board of Elections*, 72 Civ. 1460 (S.D.N.Y.). The State was faced with the distinct possibility that if it challenged the Department of Justice's determination and did not receive a favorable judicial determination in time to permit the collection of designating petitions for the 1974 primary, the three-judge Court sitting in the Southern District might, at the NAACP's request, order all State legislative contests in New York and Kings Counties to be run at large.

Accordingly, the Joint (legislative) Committee on Reapportionment prepared for introduction to the New York State Legislature a series of bills at a special session which

⁷ The first date for the collection of designating petitions for New York's 1974 primary election was on June 17, 1974. Such signatures were required to be filed no later than July 15, 1974. New York Election Law § 149-a, subds. (2), (4). The primary was scheduled for September 10. Laws of 1974, ch. 9.

were enacted on May 29 and 30, 1974 to redraw the assembly, State senate and congressional lines in Kings County and the assembly and senate lines in New York County in an effort to satisfy the demands of the United States Department of Justice.⁸ Laws of 1974, Chapters 588, 589, 590, 591 and 599. In preparing these laws, Richard S. Scolaro, the Executive Director of the Joint Committee on Reapportionment testified below (App. 103-106, 113-115) that in discussions with the Justice Department over the telephone and in person, he was advised that there be three senate and two assembly districts in the area of Kings County in which Williamsburgh is located with "substantial non-white majorities." Since the assembly district in which the entire Hasidic community was located under the 1972 reapportionment law had a non-white population of 61.5%, which the Justice Department indicated was insufficient, Mr. Scolaro "got the feeling," although the number was not specifically referred to, that a 65% non-white majority district would be approved.

The 1974 reapportionment amendments were submitted by the State of New York to the Department of Justice on May 31, 1974. By letter dated July 1, 1974 from Assistant United States Attorney General J. Stanley Pottinger to Assistant State Attorney General George D. Zuckerman, the Department of Justice announced that the Attorney General of the United States did not interpose any objection to the implementation of the 1974 reapportionment statutes (App. 283).

⁸ The result of the 1974 reapportionment, according to the Interim Report of the Joint Committee on Reapportionment, Albany, New York, May 27, 1974 (App. 175-189), was to produce out of the twenty-two assembly districts involved in Kings County, five districts having a non-white population of over 75% and two additional districts with a non-white population of over 65%. Under the 1972 reapportionment, which the Justice Department had refused to approve, there had been six assembly districts in Kings County with over 60% non-white population and one with over 50% non-white, of which five were represented by non-whites (App. 181).

C.

Proceedings Below

On June 20, 1974 a full evidentiary hearing was held before District Judge Bruchhausen in connection with petitioners' motions for a preliminary injunction and for summary judgment and the motion of the United States to dismiss the complaint for failure to state a claim for which relief can be granted and for lack of jurisdiction.

On July 25, 1974, the District Court entered an order denying the petitioners' motions for a preliminary injunction and summary judgment and granted respondents' motion to dismiss the complaint. The opinion of the District Court (377 F. Supp. 1164) held that in view of the approval of the 1974 reapportionment plan by the Attorney General of the United States, petitioners' cause of action insofar as it might be based on the Voting Rights Act of 1965 must be dismissed. The allegations by petitioners of a violation of their rights under the Fourteenth and Fifteenth Amendments were also held by the District Court to be untenable. The Court pointed out that there was no constitutional right for members of a community to be protected against the division of their community in the drawing of district lines. The District Court also pointed out that it was well settled that even if the Legislature had employed racial considerations in the drawing of the 1974 lines, such considerations were not constitutionally precluded where they were undertaken "to correct a wrong".

The District Court's order was affirmed by a 2-1 decision of the Court of Appeals. *United Jewish Organizations of Williamsburgh v. Wilson*, 510 F. 2d 512 (2nd Cir., 1974). The majority opinion, by Circuit Judge Oakes, noted that while the District Court did not have jurisdiction to "review" the Attorney General's determination of April 1, 1974 disapproving the 1972 Act, Section 5 of the Voting

Rights Act was not a bar to this suit except as to relief against the Attorney General. The Court went on to observe that while petitioners did not have standing to seek relief against the State respondents as representing the Hasidic community, they did have standing as white voters.

Turning to the merits, the Court held that there was no showing that the effect of the challenged 1974 district lines was to invidiously cancel out or minimize the voting strength of white voters in Kings County. The Court observed that Kings County is 35.1% non-white (combining the 24.7% black and 10.4% Puerto Rican population). Under the 1974 plan three of the ten senate districts in Kings County, or 30%, contained substantial non-white population majorities, while seven or 31.4% of the twenty-two assembly districts in Kings County contained a substantial majority of non-white population (510 F. 2d at 523 n. 21). Rejecting the argument that districting of racial lines is *per se* unconstitutional when taken to comply with standards of the Attorney General of the United States acting under the Voting Rights Act, the Court concluded that:

"... so long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or non-white, that districting is not subject to challenge." (510 F. 2d at 525).

In a dissenting opinion, Judge Frankel stated that this case concerned "the drawing of district lines with a central and governing premise that a set number of districts must have a predetermined non-white majority of 65% or more in order to insure non-white control in those districts". Judge Frankel concluded that no pre-existing wrong was shown of such a character in this case as to justify the use of racial quotas.

ARGUMENT

I.

There is no constitutional right to preserve ethnic community unity in the drawing of district lines.

The gravamen of petitioners' complaint was that the members of the Hasidic community in Williamsburgh, as a "closely knit" community with close cultural and religious ties, should not have been divided into separate assembly and State senate districts by the challenged 1974 State statutes.

While petitioners' desire to keep their community intact in the drawing of district lines is understandable, it must be recognized that there is no Federal constitutional or statutory requirement prohibiting a state from drawing legislative or congressional district lines which cut across city and county borders,⁹ let alone any requirement which would prohibit the division of so-called "community" lines. Nor does any group of voters have a constitutional right to be included within an electoral district that is especially favorable to the interest of one's own group, or to be excluded from a district that is dominated by some other group. *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971);

⁹ The New York State Constitution has never prohibited the division of city or community lines in the drawing of legislative districts. However, Article III §§ 4 and 5 of the New York Constitution prohibits the drawing of senate and assembly lines which divide counties and towns having less than one ratio of apportionment and guarantees to each county (with the exception of Hamilton County) at least one assembly seat. In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), these State constitutional provisions were held invalid insofar as they required the creation of legislative districts with substantial population disparities. As a result, subsequent reapportionment statutes have divided county as well as town lines. See *In re Orans*, 15 N.Y. 2d 339, 206 N.E. 2d 854, appeal dismissed 382 U.S. 10 (1965); *Matter of Schneider v. Rockefeller*, 31 N.Y. 2d 420, 293 N.E. 2d 67 (1972).

Wallace v. House, 515 F. 2d 619, 630 (5th Cir., 1975); *Taylor v. McKeithen*, 499 F. 2d 893 (5th Cir., 1974); *Gunderson v. Adams*, 328 F. Supp. 584 (S.D. Fla., 1970), aff'd 403 U.S. 913 (1971); *Ferrell v. State of Oklahoma, ex rel. Hall*, 339 F. Supp. 73 (W.D. Okla., 1972), aff'd 409 U.S. 939 (1972).

The exact number of communities in Kings County has been the subject of dispute among historians,¹⁰ political scientists, sociologists and real estate salesmen. Petitioners' witness, Congressman (and former New York City

¹⁰ In 1959, the Community Council of Greater New York in their two-volume study entitled "Population Characteristics" divided Brooklyn into the following communities: Greenpoint, Williamsburgh, Bushwick-Ridgewood, Brooklyn Heights-Fort Greene, Bedford-Stuyvesant, Crown Heights, Brownsville, East New York, South Brooklyn-Redhook, Park Slope, Sunset Park-Gowanus, Bay Ridge, Boro Park-Kensington, Bensonhurst, Gravesend, Coney Island, Flatbush-East Flatbush, Canarsie, Midwood-Flatlands, and Sheepshead Bay.

In 1969, the New York City Planning Commission in its report, "Plan for New York City 1969: A Proposal, Vol. 3 Brooklyn," recognized seventy-four communities in Brooklyn (Kings County) which it proposed to divide in the following eighteen community planning districts: CPD #1—Williamsburgh, Greenpoint; CPD #2—Downtown Brooklyn, Fort Greene, Clinton Hill; CPD #3—Bedford-Stuyvesant, Ocean Hill, Tompkins Park, Stuyvesant Heights; CPD #4—Bushwick, Ridgewood; CPD #5—East New York, Spring Creek, Cypress Hills, New Lots, Broadway Junction; CPD #6—South Brooklyn, Park Slope, Brooklyn Heights, Cobble Hill, Boerum Hill, Carroll Gardens, Red Hook, Gowanus, Windsor Terrace; CPD #7—Sunset Park, Bush Terminal; CPD #8—Crown Heights, Prospect Heights, Children's Museum, Ebbets Field, Wingate, Lefferts Gardens; CPD #9—East Flatbush, Rugby, Faragut, Clarendon, Vanderveer, Hyde Park; CPD #10—Bay Ridge, Fort Hamilton, Dyker Heights; CPD #11—Bensonhurst, Bath Beach, New Utrecht, Mapleton, Bay Parkway; CPD #12—Borough Park, Kensington, Mapleton, Bay Parkway, Ocean Parkway; CPD #13—Coney Island, Gravesend, Sea Gate; CPD #14—Flatbush, Midwood, Manhattan Terrace, Fiske Terrace, South Greenfield, Kings Highway, Old Flatbush, Caton Park; CPD #15—Sheepshead Bay, Neck Road, Brighton Beach, Manhattan Beach, Gerritsen Beach; CPD #16—Brownsville, Ocean Hill; CPD #17—Canarsie, Paerdegat Basin; CPD #18—Flatlands, Marine Park, Bergen Beach, Mill Basin.

Councilman) Frederick W. Richmond testified that there were "fifty or sixty clearly-defined communities in the County of Kings" (App. 31). It is obvious that each of these fifty or more communities, which vary considerably in population, could not be treated as separate entities in the establishment of 8.6 senate districts or 21.4 assembly districts that Kings County was entitled to by virtue of its population and still satisfy the overriding constitutional requirement that legislative districts must be equal in population. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

In addition to the Federal constitutional requirement that districts be substantially equal in population, the New York State Constitution requires that in the formation of State legislative districts, "blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants." N.Y.S. Const., Art. III, §§ 4, 5. In applying this so-called "block on the border" constitutional requirement, the 1974 redistricting statutes in Kings County created seven new assembly districts which each have the population of 120,768 while the new senate districts created in Kings County do not vary by more than one person in population. See Interim Report of the Joint Committee on Reapportionment, Appendix "C, K" (App. 192, 195).

A plea for separate community recognition, similar to the complaint in the instant action, was made by Negro residents of the East Elmhurst community in *Ince v. Rockefeller*, 290 F. Supp. 878 (S.D.N.Y., 1968). Plaintiffs in the *Ince* case argued that the division of East Elmhurst into two separate assembly districts was a constitutional deprivation of the rights of the Negro residents of that community who assertedly shared a common racial, political and cultural background. In rejecting that contention and in dismissing the complaint in the *Ince* case, District

Judge Pollack stated (p. 883):

"It is obvious that each of the 44 communities in Queens could not be treated as separate entities in the establishment of 16 equal assembly districts that Queens County was entitled to by virtue of its population. Pleas for separate community recognition, similar to those raised by plaintiffs here, were made by intervenors from Flatbush and Bay Ridge in contesting the recently enacted congressional districts in New York State. In rejecting their contentions, the three-judge Court in its unanimous opinion in *Wells v. Rockefeller*, 281 F. Supp. 821, 825 (S.D.N.Y., 1968) stated:

'The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side. The twenty or more identifiable communities in Brooklyn may well have preserved their own traditions from the days of the Dutch, although in today's rapidly changing world, this is doubtful. But even Brooklyn's large population will not support twenty community congressmen. Of necessity, there must be lines which divide.'

Similarly, the Court below recognized that it would have been impossible for the New York Legislature to have preserved community political integrity and comply with *Reynolds v. Sims*, *supra*. 510 F. 2d at 521. Accordingly, the Court correctly held that petitioners did not have standing as representatives of the *Hasidic* community to seek relief against the State respondents.

II.

The challenged redistricting plan was enacted as a remedial measure in conformity with the unchallenged directive of the Attorney General of the United States and has the approval of the Attorney General pursuant to the Voting Rights Act.

During the course of petitioners' argument before the Court of Appeals and now in their brief before this Court, petitioners have modified the original theory of their complaint to contend that even if they do not have standing as representatives of the Hasidic community in Williamsburgh to challenge the State's 1974 redistricting plan, they have standing as *white* voters to argue that the 1974 reapportionment should be declared invalid because it involved the purposeful use of racial considerations in the drawing of district lines.

There is no dispute that the State of New York utilized racial statistics in drawing the 1974 redistricting plan. But the record in this case is also clear that the use of racial considerations in the preparation of the 1974 redistricting plan was not for any invidious discriminatory purpose, but was employed in support of a remedial measure designed to overcome the objections that the Attorney General of the United States had raised in refusing to approve New York's 1972 reapportionment statute.

The April 1, 1974 determination of the Department of Justice, set forth in the letter from Assistant United States Attorney General J. Stanley Pottinger (App. 14-16), refused to approve changes in certain assembly and senate district lines in Kings and New York Counties (based on Chapter 11 of the New York Laws of 1972) on the ground that while the purpose of those district lines might not have been to discriminate, the Department of Justice could not conclude that such lines "will not have the effect of abridging the right to vote on account of race or color."

With particular reference to the State legislative district lines in Kings County, the Pottinger letter observed:

"Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist." (App. 15)

While the State does not agree with the April 1, 1974 determination of the United States Attorney General,¹¹ the

¹¹ The submissions by representatives of the State of New York to the Department of Justice in support of the 1972 reapportionment statute (Chapter 11 of New York Laws of 1972) showed that of the twenty-one full assembly districts in Kings County, six assembly districts had a non-white population in excess of 60% while a seventh district (the 59th AD) had a non-white population of 52.4% (App. 266). Five of these assembly districts were represented by non-white legislators in the 1973-74 session. The population statistics show that of the eight senate districts located fully within Kings County (which also contains parts of two other districts shared with Queens and New York Counties), three contained non-white majorities. Although only the 18th SD was represented by a non-white legislator in the 1973-74 session, the 25th SD which was represented by a white legislator had a non-white population of 68.7%.

The State of New York argued that the concentration of non-whites that appeared in the 1972 redistricting plan was the unavoidable result of residential factors since there are very few non-whites living in the southern half and in the western portion of Kings County (see the racial maps of Kings County appended to this brief).

In concluding that the State of New York had not met its legal burden of proving that the submitted plans did not have the effect of abridging the right to vote in Kings County, the Department of

(footnote continued on following page)

exigencies of time (see p. 8, *supra*) required that new legislation be enacted immediately to satisfy the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974.¹²

In endeavoring to satisfy the Department of Justice, it was obviously necessary for the New York Legislature to carefully consider the racial composition of individual City blocks in order to transfer non-white voters from the allegedly over-concentrated 18th Senate District and 53rd, 54th, 55th and 56th Assembly Districts into adjoining dis-

(footnote continued from preceding page)

Justice was apparently following the approach that any redistricting plan which does not maximize the voting potential of non-whites must be deemed to have a discriminatory effect. We believe such an approach not only ignores political realities (since it assumes black and Puerto Rican voters will unite behind a common candidate), but runs contrary to the teachings of this Court and lower Federal court decisions which have consistently held that no group is constitutionally entitled to an apportionment structure designed to maximize its political advantages. See *Whitcomb v. Chavis*, 403 U.S. 124, 149-160 (1971); *White v. Regester*, 412 U.S. 755, 765-766 (1973); *City of Richmond v. United States*, 422 U.S. 358 (1975); *Wallace v. House*, 515 F. 2d 619, 630 (5th Cir., 1975); *Zimmer v. McKeithen*, 485 F. 2d 1297, 1305 (5th Cir., 1973), cert. granted, 432 U.S. 1055 (1975); *Howard v. Adams County Board of Supervisors*, 453 F. 2d 455 (5th Cir., 1972); *Ferrell v. Oklahoma*, 339 F. Supp. 73, 83 (W.D. Okla.), aff'd 409 U.S. 939 (1972); *Mann v. Davis*, 245 F. Supp. 241, 245 (E.D. Va., 1965), aff'd 382 U.S. 42 (1965).

¹² Counsel for the State of New York were aware of the fact that although the plaintiffs in *Beer v. United States*, 374 F. Supp. 357 (D.D.C., 1974), prob. juris. noted 419 U.S. 822 (1974), had requested and received accelerated consideration of their declaratory judgment action challenging a determination of the United States Department of Justice pursuant to § 5 of the Voting Rights Act, a decision was not entered by the District Court until more than four months after the conclusion of oral argument. The April 1, 1974 determination of the Department of Justice was issued on the sixtieth and last date to consider New York's submission of the 1972 redistricting statute and came less than three months before the date for candidates to circulate designating petitions for legislative contests in New York State (see p. 8, *supra*).

tricts of allegedly under-concentrated minority voters. As reported in the Interim Report of the Joint Committee on Reapportionment, New York's 1974 reapportionment statutes involved the transfer of non-white pockets in the 18th Senate District into the 17th and 23rd Senate Districts to raise the percentage of non-white residents in the 17th Senate District to 77.1% and in the 23rd Senate District to 71.1%. These transfers reduced the percentage of non-white voters in the 18th Senate District to 72.1% (App. 179-180). In the Assembly, the Legislature transferred blocks containing a heavy concentration of non-white residents from the 56th and 55th Assembly Districts into the 57th and 59th Assembly Districts to create a non-white population of 65.0% in the 57th Assembly District and 67.5% in the 59th Assembly District (App. 181-185). These population shifts as reflected in the challenged statutes (Chapters 588, 589, 590 and 591 of the New York Laws of 1974) led to the securing of approval by the United States Attorney General on July 1, 1974 (App. 283). But the alterations in district lines that were necessary to obtain the Attorney General's approval and maintain equality of population among these legislative districts resulted in the division of the Hasidic community between the 56th and 57th Assembly Districts and between the 23rd and 25th Senate Districts (App. 112-115).

The use of racial considerations by public officials in support of a remedial measure designed to further integration has been sustained in a wide variety of cases.

In school desegregation cases, this Court has upheld the imposition of racial ratios among school faculties in *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969), and the use of a pupil assignment plan based on the race of students in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). See also *Wanner v. County School Board of Arlington County*, 357 F. 2d 452, 454 (4th Cir., 1966); *United States v. Jefferson*

County Board of Education, 372 F. 2d 836, 876 (5th Cir., 1966), cert. denied 389 U.S. 840 (1967).

Official recognition of race was found necessary to achieve fair and equal opportunity in the selection of grand juries in *Brooks v. Beto*, 366 F. 2d 1, 24 (5th Cir., 1966).

Consideration of race by public officials in promoting integrated housing has been sustained in *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2nd Cir., 1968), and in *Otero v. New York City Housing Authority*, 484 F. 2d 1122 (2nd Cir., 1973).

Moreover, the use of racial quotas requiring preferential hiring of non-whites to overcome the past effects of racial discrimination in employment has been sustained. See *Erie Human Relations Committee v. Tullio*, 493 F. 2d 371 (3rd Cir., 1974); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission*, 482 F. 2d 1333, 1340 (2nd Cir., 1973); *Castro v. Beecher*, 459 F. 2d 725, 736-737 (1st Cir., 1972); *Carter v. Gallagher*, 452 F. 2d 315, 331 (8th Cir., 1971), cert. denied 406 U.S. 950 (1972); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F. 2d 9 (1st Cir., 1973), cert. denied 416 U.S. 957 (1974).

Petitioners argue that the above cases involved race-conscious remedial measures designed to overcome a past history of official discrimination which has not been established in the case at bar. Rather, petitioners point out that there has been no finding or evidence of past discrimination against non-white voters in Kings County by any executive, legislative or judicial body to justify the remedy that the State has provided in response to the Justice Department's refusal to approve the 1972 legislative districts in that county.

It is true that the Justice Department's April 1, 1974 determination which objected to certain of the district lines in Kings County (App. 14-16) did not contain any

finding of past or present discrimination against non-white voters in Kings County, but rested on the Department's conclusion that the State had not met its burden¹³ of proving that the submitted plans may not produce the effect of abridging the right to vote because of race or color in Kings and New York Counties. However, this Court in *Georgia v. United States*, 411 U.S. 526 (1973) held, in its majority opinion, that a specific finding of discrimination by the Attorney General was not required as a pre-condition to bar the enforcement of a statute that had not received the Attorney General's approval under Section 5 of the Voting Rights Act.

Since the State of New York was obliged to use racial statistics in the preparation of its 1974 reapportionment plan to overcome the objections that the Department of Justice had raised with respect to the prior district lines, it is clear that the 1974 reapportionment plan must be sustained as a remedial measure designed to secure compliance with the Voting Rights Act.

III.

A State may consider race in the drawing of district lines to attempt to achieve a "racially fair" result in the election of State legislators.

If this Court finds that the Department of Justice employed an invalid standard in rejecting New York's 1972 reapportionment plan for New York and Kings Counties,

¹³ The imposition of the burden of proof on the submitting authority by Title 28 CFR § 51.19, as interpreted by the Department of Justice in connection with New York's 1972 reapportionment plan (see footnotell, *supra*) raises the question as to whether any state can meet its burden of proving that a reapportionment plan does not have the purpose or effect of denying or abridging the right to vote because of race or color unless it can be demonstrated that no other reapportionment plan could have improved the chances for electing non-white legislators.

it does not necessarily follow that New York's 1974 reapportionment plan must be declared unconstitutional. Rather, the issue to be determined is whether a state may employ racial statistics in drawing district lines to improve a minority group's chance of electing legislators in proportion to their number in a county even when the state is under no legal compulsion to overcome a past history of racial discrimination.

Concededly, this Court has never had to consider the constitutionality of a reapportionment plan that involved a color-conscious effort to produce a "racially fair" result.¹⁴ However, this Court's opinion in *Gaffney v. Cummings*, 412 U.S. 735 (1973), which involved a politically-conscious effort to achieve "political fairness" between the major political parties in a state, is instructive.

In *Gaffney, supra*, this Court found that virtually every senate and house district line in a reapportionment plan drawn for the Connecticut State Legislature by an apportionment board was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties. But the majority

¹⁴ This issue does not appear to have been decided by any court. However, Federal courts have upheld the right of school boards to use racial classifications to correct *de facto* racial imbalance in a school system even where there was no constitutional duty to act. See *Offermann v. Nitkowski*, 378 F. 2d 22, 24 (2nd Cir., 1967) where the Court said "That there may be no constitutional duty to act to undo *de facto* segregation, however, does not mean that such action is unconstitutional." See also *Fuller v. Volk*, 230 F. Supp. 25, 33-34 (D.N.J., 1964), vacated on other grounds 351 F. 2d 323 (3rd Cir., 1965), 250 F. Supp. 81 (D.N.J., 1966); *Olson v. Board of Education*, 250 F. Supp. 1000 (E.D.N.Y., 1966). In *Porcelli v. Titus*, 302 F. Supp. 726 (D.N.J., 1969), aff'd 431 F. 2d 1254, 1257 (3rd Cir., 1970), cert. denied 402 U.S. 944 (1971), the right of the Newark Board of Education to consciously consider race in seeking to increase the number of black supervisory officials in the school system was sustained.

opinion by Mr. Justice White recognized that the fact that political considerations were taken into account in fashioning a reapportionment plan where its purpose was to provide districts that would achieve "political fairness" between the two major political parties, was not sufficient to invalidate it. The Court noted that the very essence of districting is to produce a more "politically fair" result than would be reached with elections at large, and that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results" (412 U.S. at 753). The Court concluded that:

"... neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S. at 754.

Similarly, a "racially mindless" approach may also produce, whether intended or not, a grossly unfair result insofar as members of a particular minority group are concerned. For example, in Kings County the bulk of the black population is concentrated near the center of the county (see appendix, *infra*). Since the traditional method in drawing district lines in New York State prior to 1974 has been to start at the peripheries of a county and work towards the center (App. 94, 118), it is possible that the black population was divided into more districts than would have been the case if the redistricting procedures had started at the interior of the county. The 1974 district lines in Kings County were, accordingly, drawn with racial considerations in mind to avoid any unintentional discriminatory effects that prior districting plans may have had in reducing the chances to elect minority group representatives to the State Legislature.

Moreover, just as this Court in *Gaffney, supra*, recognized that it was more plausible to assume that those who redistrict and reapportion work with political data in mind, it is more realistic to recognize that most reapportionment draftsmen are cognizant of the racial composition of the districts they are fashioning. The fact that race is considered by a reapportionment draftsman should not, in and of itself, be a basis for invalidating the reapportionment plan.¹⁵ It is only in the most flagrant examples of racial gerrymandering such as in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), or where it can be shown that racial considerations are employed to minimize or eliminate the political strength of a minority group that racial considerations in the drawing of district lines should be constitutionally condemned. Cf. *White v. Regester*, 412 U.S. 755, 765-770 (1973). As (then) Circuit Judge Stevens observed in his dissenting opinion in *Cousins v. City Council of the City of Chicago*, 466 F. 2d 847, 856 (7th Cir., 1972), cert. denied 409 U.S. 893 (1973):

"... A test which would require legislators to act with complete indifference to the impact of districting on cognizable groups of voters is simply much too strict. It would either open the door to invalidation of all apportionment plans or require legislators to perform ridiculous charades in their public deliberations and to do their only significant work in private conference."

While petitioners' standing as *white* voters to challenge the 1974 reapportionment plan was upheld by the Court below, that Court held that there had been no showing "that the effect of the New York legislature's drawing the 1974 district lines as it did was invidiously to cancel out or minimize the voting strength of white voters in Kings County." 510 F. 2d at 523. Under the 1974 reapportionment plan,

¹⁵ See, Note, "Compensatory Racial Reapportionment," 25 Stanford L. Rev. 84 (1972).

whites who constitute 64.9% of the population of Kings County (for purposes of the Voting Rights Act, the Puerto Rican population is considered non-white), are in a majority in 68.6% of the assembly districts and 70% of the senate districts in Kings County. Nor was any evidence introduced or any claim asserted as to any history of official racial discrimination against whites, or any indication that the white community in Kings County has ever been the victim of political or other racial discrimination.

Thus, while there might be individual voters who would have preferred to have been in different legislative districts, the 1974 reapportionment plan in Kings County cannot be said to discriminate on the basis of race.

IV.

If the challenged portion of the 1974 reapportionment plan is invalid, this Court should mandate the return to the 1972 district lines in Kings County.

In the event this Court determines that the challenged 1974 reapportionment plan is unconstitutional, it should direct the District Court to order the use of the district lines established by Chapter 11 of the New York Laws of 1972 for the election of members of the New York Legislature from Kings County.

A remand by this Court without such instructions would threaten to throw the electoral processes in Kings County into a state of chaos. A civil action, *NAACP v. New York City Board of Elections*, 72 Civ. 1460 (S.D.N.Y.), is still pending before a statutory three-judge court in which the NAACP has requested an injunction pursuant to § 5 of the Voting Rights Act to enjoin the conduct of any election in Kings County (as well as New York County and The Bronx) that is held using district lines that have not been approved by the Attorney General. Since the Attorney General has not approved the district lines that were

established for Kings County by Chapter 11 of the Laws of 1972, a declaration by this Court invalidating the 1974 reapportionment plan without a direction to the District Court to order the use of the 1972 reapportionment plan would require the New York Legislature to draft still another redistricting plan for Kings County. It is obvious that the draftsmen of such a plan would be faced with a nearly impossible task in striving to meet the conflicting demands of the Department of Justice, petitioners and the NAACP. Moreover, the draftsmen¹⁶ of a new reapportionment plan would be pressed by limitations of time to develop a plan in time for the 1976 primary election.¹⁷

The most equitable and feasible remedy, in the event of a remand, would be for this Court to direct the use of the district lines established by Chapter 11 of the New York Laws of 1972 for future elections in Kings County until validly superseded by an act of the New York Legislature. The legislative districts established by Chapter 11 are presently in operation throughout the State of New York with the exception of Kings and New York Counties, and have been found to be in compliance with the Constitutions of the State of New York and the United States by New York's highest court. *Matter of Schneider v. Rockefeller*, 31 N.Y. 2d 420, 293 N.E. 2d 67 (1972).

As noted earlier (n. 11, *supra*), six of the full twenty-one assembly districts in Kings County that were established by Chapter 11 of the New York Laws of 1972 had a non-

¹⁶ It must be noted that, at the present time, there is no legislative committee on reapportionment in New York State. The New York Legislature abolished the Joint Committee on Reapportionment in 1975 and terminated its staff. The computers that were used by the Joint Committee in preparing the 1972 and 1974 reapportionment plans have been returned to IBM.

¹⁷ A primary election for state legislative and congressional seats in New York State is presently scheduled for September 14, 1976 (N.Y. Election Law § 191(1)). The first date for the circulation of petitions to qualify for the primary would be June 22, 1976 (N.Y. Election Law § 136(9)).

white population in excess of 60% while a seventh district had a non-white population of 52.4%. Three of the eight senate districts located fully within Kings County contained non-white majorities under the 1972 plan.

Accordingly, if this Court finds that the 1974 reapportionment plan was invalid in attempting to maximize the voting potential of a racial group, the use of the 1972 reapportionment plan in Kings County would provide for the future conduct of elections under district lines that do not discriminate against any racial group.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed. However, in the event this Court determines that the challenged 1974 reapportionment plan is unconstitutional, it should direct the District Court to order the use of the district lines established by Chapter 11 of the New York Laws of 1972 for the election of members of the New York Legislature from Kings County.

Respectfully submitted,

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APPENDIX

BROOKLYN BLACK POPULATION FROM
1970 U.S. CENSUS

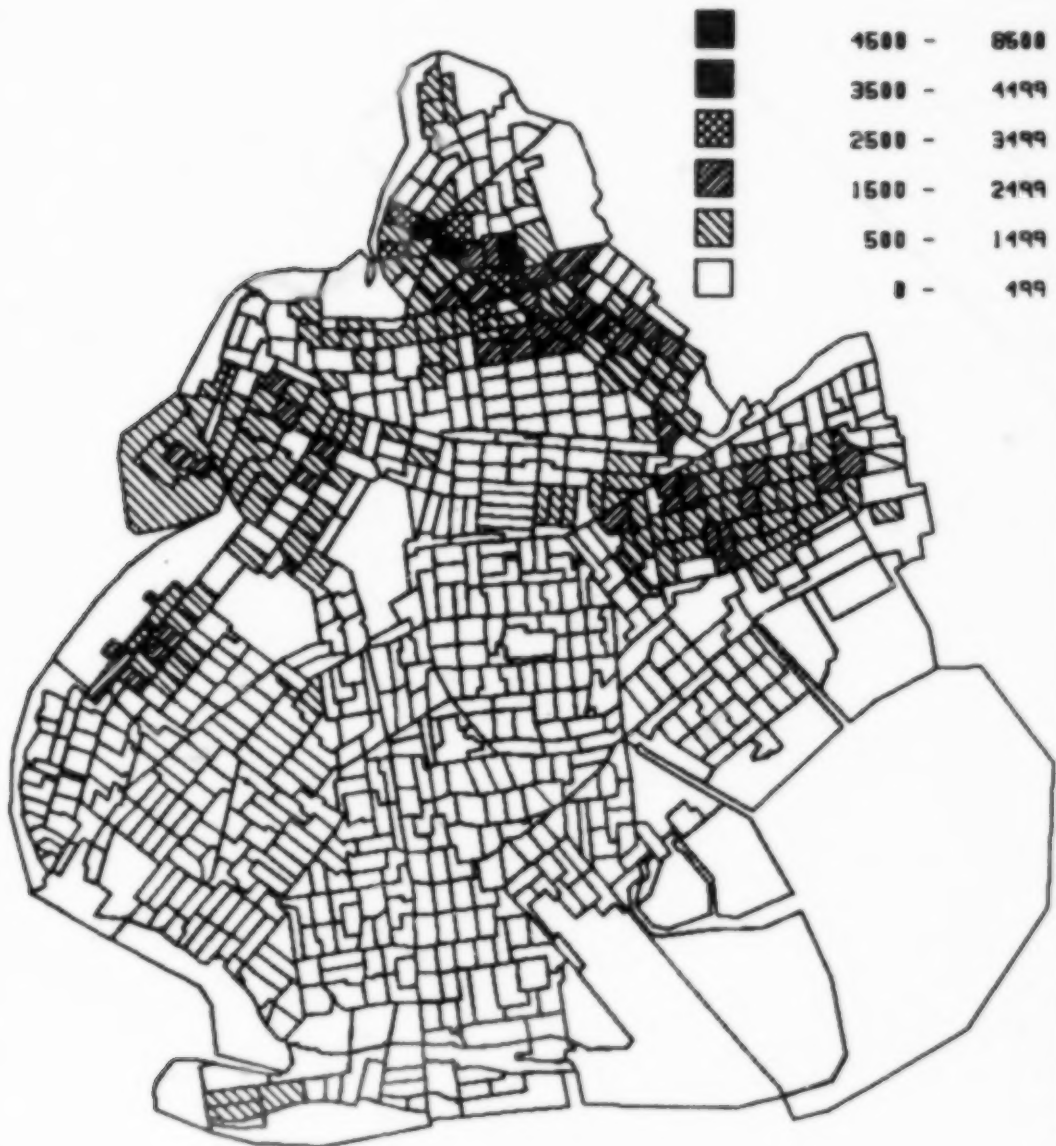
From the City Record, Official
Journal of the City of New York,
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BROOKLYN
BLACK POPULATION
FROM 1970 U S CENSUS

BROOKLYN PUERTO RICAN
POPULATION FROM 1970
U.S. CENSUS

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PUERTO RICAN POPULATION
FROM 1970 U S CENSUS



MAR 8 1976

MICHAEL ROSS, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURG, INC., *et al.*,*Petitioners,*

v.

HUGH L. CAREY, *et al.*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**BRIEF FOR RESPONDENTS-INTERVENORS**

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENTS-INTERVENORS

Question Presented

Are Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, insofar as they altered the Senate and Assembly district lines in Kings County, unconstitutional?

Statutes and Regulations Involved

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, provides in pertinent part:

Whenever . . . a State or political subdivision with respect to which the prohibitions set forth in section

1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such preceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Section 51.10, 28 C.F.R., provides in pertinent part:

(a) Each submission shall include:

• • •

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General in his consideration. The Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

• • •

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have already been submitted the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proposed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates,

by race, who have run for such office in the last two elections and the results of such elections.

Section 51.19, 28 C.F.R. provides:

Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

Summary of Argument

In renewing the Voting Rights Act in 1970 and 1975 Congress was particularly concerned with the effect of

section 5 on redistricting in covered jurisdictions. The type of districting configuration which section 5 prohibits is the fragmentation of much or all of a non-white community among majority white districts. Congress concluded that such fragmentation generally precluded the election of non-white officials and diluted the value of minority votes.

The 1972 district lines in Kings County minimized minority voting strength in the manner which section 5 was adopted to prevent. Although the non-white community in Kings County is concentrated in a single contiguous ghetto in and around Bedford Stuyvesant, the bulk of that community was divided into small pieces and placed in majority white districts. Because of white bloc voting every one of these districts, and every other predominantly white Senate and Assembly district in New York City, was and is represented by a white. These lines clearly had the discriminatory effect forbidden by section 5, and were properly disapproved by the Attorney General.

The 1974 lines adopted after the Attorney General's decision were not unfair to whites. Although the lines resulted in five new districts with non-white majorities, white candidates were elected in four of these districts. The proportion of Senate and Assembly districts with non-white majorities was still significantly smaller than the proportion of the County population that is non-white.

The sole injury of which petitioners complain is that the Hassidic community has been divided between two Assembly districts and between two Senate districts; petitioners have no objection to being in a predominantly non-white district so long as their community remains intact. Petitioners allege that the sole reason their community was divided was that the division was necessary to create one or more predominantly non-white districts. The record,

however, shows that this was not the actual cause of the division of the Hassidic community. See pp. 28-31, *infra*.

When New York fashioned the 1974 lines it was clearly obligated to consider the racial composition of the proposed lines. The Attorney General was required to consider that information in assessing whether the proposed 1974 lines were still discriminatory, and New York was required to provide that information to him. 28 C.F.R. §51.10. It would have been impossible to determine whether the 1974 lines unlawfully fragmented the non-white community into predominantly white districts without knowing the racial composition of the districts involved. It would have been irresponsible for New York to have adopted district plans at random, i.e. ignoring the racial composition of the proposed districts, until it stumbled across one which was free of such a discriminatory effect.

The Attorney General's decision objecting to the 1972 lines was correct, and petitioners concede they are not entitled to challenge it on the merits. Although petitioners object that the Attorney General rejected the lines because New York had not proved they were not discriminatory, the regulations placing the burden of proof on the submitting authority were upheld by this Court in *Georgia v. United States*, 411 U.S. 526 (1973). It is of no import that the Attorney General made no finding as to the purpose of the 1972 lines, since section 5 forbids the use of lines with a discriminatory effect regardless of their purpose.

In assessing the impact of the 1974 lines New York and the Attorney General needed to know whether the majority of each district's eligible voting age population was white or non-white. Because of several problems with the Census data, however, it was not possible to determine directly and

accurately what portion of the eligible voting age population is white and what portion is non-white. The actual Census data used by the legislature was unadjusted "February Formula" figures. Because of several factors a district with a February Formula non-white total population of 65% is one in which the white and non-white eligible *voting age* population are approximately equal. Regardless of whether, as is unclear on the face of the record, New York used this particular method to determine the eligible voting age population of proposed districts, some such method was required in order to comply with section 5.

Introduction

As the grant of certiorari signifies, this litigation is important. It is important to the people of Brooklyn, and to the integrity of the electoral process in the State of New York. It is important to the full realization of the constitutional mandate of "one man, one vote." And it is important to the full implementation—by the Attorney General of the United States and by the legislatures of the several states, including New York—of the Voting Rights Act of 1965, and of the Fourteenth and Fifteenth Amendments, which that Act enforces.

The legal issues on which this litigation turns are significant, but they are not as complex or as wide-ranging in constitutional implication as they have been made to appear by petitioners' brief and certain of the briefs *amici*. As this litigation has moved upwards to this Court, it has acquired an overlay of doctrinal portentousness and ambiguity unsupported by the particular facts which have given rise to this case or by its particular procedural posture. Properly understood, this case does not require—indeed it does not warrant—present resolution of huge

abstract constitutional issues which lie far beyond the confines of the actual controversy now before this Court. With a view to focusing this Court's attention on the actual controversy, and on the legal issues necessarily implicated by that controversy, we have thought it useful to present a detailed Introduction. What follows is intended to set forth in detail the factual background and foreground of this controversy in the context of the purpose of the Voting Rights Act.

A. Application of the Voting Rights Act to New York

This case has its origins in the 1970 amendments to the Voting Rights Act of 1965. As originally enacted, sections 4 and 5 of the Act applied only to states or subdivisions which, as of November 1, 1964, maintained a literacy test or other test or device and in which, as of the presidential election of 1964, less than 50% of the voting age population registered or voted. 79 Stat. 438, 439. When the Act came up for renewal in 1970, Congress found that in 1968 the registration or voting rate had fallen below 50% in several other jurisdictions, most notably Kings, New York and Bronx Counties in New York.¹ Congress concluded this low rate in New York was the result of New York's literacy test, which was believed to discriminate against black voters who had received an inferior education in segregated schools in both the north and south.² Concern was also expressed that New York's literacy test had deterred blacks from seeking to register³ and had been

¹ 116 Cong. Rec. 7654, 6659 (Remarks of Senator Cooper) (1970).

² 116 Cong. Rec. 5533 (Remarks of Senator Hruska), 6158-59 (Remarks of Senators Dole and Mitchell), 6661 (Remarks of Senator Griffin) (1970).

³ 116 Cong. Rec. 5533 (Remarks of Senator Hruska), 6152 (Remarks of Senator Eastland) (1970).

adopted for the purpose of discriminating on the basis of race.⁴ See *NAACP v. New York*, 413 U.S. 345, 370 (1973) (Douglas, J., dissenting). Because of these circumstances Congress altered the coverage formula of sections 4 and 5 so as to apply them to the three counties in New York, which were "a definite target of the 1970 amendments." *NAACP v. New York*, 413 U.S. 345, 357 (1973).

In December 1971 the State of New York instituted an action in the District Court for the District of Columbia under section 4(a) of the Voting Rights Act, 42 U.S.C. §1973b(a), seeking a declaratory judgment that would exempt New York from provisions of the Act. On April 3, 1972, the United States consented to entry of summary judgment in that case. Four days later the NAACP and certain individuals requested leave to intervene.⁵ The motion to intervene was denied, and summary judgment was granted awarding the exemption. *New York v. United States*, Civ. No. 2419-71 (D.D.C.) (unreported). On appeal this Court held that the denial of intervention in April 1971 was not improper because the applicants "were free to renew their motion to intervene following the entry of summary judgment since the District Court was required under § 4(a) of the Act, 42 U.S.C. §1973b(a) to retain jurisdiction for five years after judgment." *NAACP v. New York*, 413 U.S. 345, 368 (1973). On remand, the applicants renewed their motion to intervene, which was granted on November 5, 1973.

On January 4, 1974, the district court rescinded the exemption *pendente lite*, and New York thereafter submitted its 1972 redistricting plan to the Attorney General

⁴ 116 Cong. Rec. 6659 (Remarks of Senator Murphy), 6660 (Remarks of Senator Cooper) (1970).

⁵ The intervenors-respondents in this action are the same group and individuals who intervened in *New York v. United States*.

for approval under section 5 of the Voting Rights Act. On April 25, 1974, the intervenors moved for summary judgment permanently denying the exemption sought by New York.⁶ Intervenors maintained, *inter alia*, that New York's literacy test had the effect of discriminating against blacks because the rate of illiteracy among blacks was two to three times as high as among whites.⁷ Intervenors contended that this difference in literacy rates was due to discrimination in the New York City school system. See *Gaston County v. United States*, 395 U.S. 285 (1969). The evidence demonstrated that predominantly non-white schools were inferior in numerous respects: the teachers had less training, the buildings were older and had fewer facilities, per capita expenditures were lower, class sizes were greater, special classes were less common and overcrowding more frequent.⁸ On April 30, 1974, the district court granted intervenors' motion for summary judgment. This Court affirmed. 419 U.S. 888 (1974).

B. The Purpose of the Voting Rights Act

The 1972 district lines presented precisely the type of discriminatory effect which the Voting Rights Act was adopted to prevent.

The Voting Rights Act of 1965 abolished a variety of tests and devices which had theretofore been employed to prevent the registration of non-white voters, and authorized the use of federal registrars where local officials

⁶ The United States, which had earlier moved to reopen the case because of *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974), did not itself move for summary judgment or support intervenors' motion therefor.

⁷ See Motion to Affirm of Intervenors-Appellees, No. 73-1740, pp. 12, 2a-3a.

⁸ *Id.*, pp. 10-11, 7a-9a. A portion of the documentary evidence involved is set out in the Appendix in No. 72-129, *NAACP v. New York*, pp. 93a-116a.

continued to refuse to register blacks or other minority groups. 42 U.S.C. § 1973b(a). But Congress recognized that even if non-whites were able to register and vote, election laws could be so fashioned as to harness white bloc voting to prevent the election of minority candidates. Congress was well aware that there were virtually no non-white elected officials in the jurisdictions covered by section 5, and that, in the absence of meaningful minority political strength, some white officials in those jurisdictions had in the past been openly indifferent to the interests of their non-white constituents. Congress therefore provided in 1965 that any new election laws adopted in covered jurisdictions would be subject to prior federal scrutiny under section 5 of the Voting Rights Act, in order to assure that such laws did not have the purpose or effect of vitiating minority voting strength.

In 1970, when Congress was considering renewing the Voting Rights Act for another five years, the application of section 5 to redistricting had become a major concern. The United States Commission on Civil Rights reported to Congress that, in the face of increasing minority registration, a number of jurisdictions had redrawn their district lines so that they "aggregated predominantly Negro counties with predominantly white counties [thus] preventing election of Negroes".⁹ The effect of these lines was to divide up a predominantly black area and place the fragments in districts with white majorities.¹⁰ During both the House and Senate hearings witnesses testified that the value of the newly won minority vote had been frequently diluted by district lines which "divide concentrations of

⁹ United States Commission on Civil Rights, *Political Participation*, p. 177 (1968).

¹⁰ *Id.*, pp. 31, 34-35. Congress expressly relied on this report in deciding to extend the Act. 116 Cong. Rec. 5521, 5526 (1970).

Negro voting strength" and thus "nullify local black majorities."¹¹ During the House and Senate debates repeated concern was expressed that the value of minority votes would be diluted by submerging them in districts with white majorities.¹²

By 1975 the most important impact of section 5 was on redistricting. During the years in which the Act had been in effect more than one-third of all the Attorney General's objections¹³ were to redistricting; 58 plans in 9 states had been disapproved under section 5. Former Attorney General Katzenbach testified in 1975, "Section 5 has had its broadest impact . . . in the areas of redistricting and reapportionment. A substantial majority of the objections have been directed at this type of change. A redistricting plan or election system can be arranged so that a black candidate will have little chance of winning even with the full support of the black community. . . . Objections to this type of change, more than any other, have allowed blacks

¹¹ Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 91st Cong., 1st Sess., pp. 3, 17 (1969); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., p. 47 (1969-70).

¹² 115 Cong. Rec. 38486 (Remarks of Rep. McCulloch); 116 Cong. Rec. 5520-21 (Remarks of Senator Scott), 5527 (Remarks of Senator Scott), 6168 (Remarks of Senator Scott), 6358 (Remarks of Senator Bayh) (1970).

¹³ S. Rep. No. 94-295, p. 18; H. R. Rep. No. 94-196, p. 10; 121 Cong. Rec. S 13401 (Remarks of Sen. Tunney) (Daily ed., July 23, 1975); Rec. S 13669 (Remarks of Senator Kennedy) (Daily Ed., July 24, 1975); Hearing Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 95 (Statement of Frank Parker), 582 (Statement of J. Stanley Pottinger) 121 Cong. Rec. S 13669 (Remarks of Senator Kennedy) (Daily Ed. July 24, 1975); Hearings Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 170 (Statement of J. Stanley Pottinger) (1975).

to achieve a greater measure of political self-determination.”¹⁴ The Commission on Civil Rights, in an extensive report to Congress, stressed the large number of instances in which the application of section 5 had prevented the use of district lines which would have had the effect of discriminating on the basis of race.¹⁵ Congress concluded that such redistricting had become the major tactic for effectively disenfranchising non-whites.¹⁶

The testimony before both House and Senate Committees revealed that discriminatory plans took two forms: (1) the minority community was divided among several predominantly white districts or, (2) where this was not possible because of the large number of minority voters, a single overwhelmingly non-white district was created and the remaining non-white voters divided among predom-

¹⁴ Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 124 (1975).

¹⁵ United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 204-319 (1975).

¹⁶ S. Rep. No. 94-295, pp. 16-18; H. R. Rep. No. 94-196, pp. 10, 18-19, 77-8, 99; 121 Cong. Rec. S 13401 (Remarks of Sen. Tunney) (Daily Ed. July 23, 1975); S 13668 (Remarks of Sen. Humphrey), S 13670 (Remarks of Sen. Kennedy) (Daily Ed. July 24, 1975); H 4708 (Remarks of Rep. Young), H 4710 (Remarks of Rep. Rodino), H 4712, H 4715 (Remarks of Rep. Edwards), H 4743 (Remarks of Rep. Roybal), H 4346 (Remarks of Rep. Jordan) (Daily Ed. June 2, 1975); H 4879 (Remarks of Rep. Badillo), H 4906 (Remarks of Rep. Conyers), H 4910 (Remarks of Rep. Stokes) (Daily Ed. June 4, 1975); Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1 (Statement of Senator Tunney), 16 (Statement of Senator Hart), 47, 51 (Statement of Clarence Mitchell), 75 92 (Statement of Arthur Flemming), 129, 142 (Statement of Frank Parker), 225 (Statement of Howard Glickstein) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 23, 26, 31 (Statement of Arthur Flemming) 331, 340 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 204-327, 343 (1975).

inantly white districts.¹⁷ Congress knew that the practice of the Attorney General under section 5 was to object to both forms of gerrymandering.¹⁸ Senator Bayh, one of the sponsors of legislation to renew the Act, noted that a key consideration in appraising whether a redistricting plan had a discriminatory effect was or whether it would “afford minorities ‘representation reasonably equivalent to their political strength’ This means that where blacks are more than 40 percent of the population as in Richmond, section 5 requires a redistricting plan in which a comparable portion of the seats have substantial black majorities.”¹⁹ Professor Howard Glickstein, former staff director of the Civil Rights Commission, whose views were authoritatively described as reflecting the Senate “committee’s interpretation of the legal standards for redistricting cases under section 5,”²⁰ stated that “[T]o the extent that it is realistically feasible to draw a line which does not divide the minority community and thus does not dilute the value

¹⁷ Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 163-9, 180-86 (Mississippi Law Journal Article); 217 (Statement of Howard Glickstein) (1975); Hearings Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 340 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 204-327 (1975).

¹⁸ See e.g. Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 553 (Statement of J. Stanley Pottinger), 667 (Letter of J. Stanley Pottinger disapproving New York redistricting), 677-8 (Letter of J. Stanley Pottinger disapproving Arizona redistricting); 1038 (Statement of Howard Glickstein) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 252, 262 (Statement of J. Stanley Pottinger), 1205, 1212, 1213-1218, 1224, 1272, 1273, 1277, 1281 (U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*); 1505-10 (D. Hunter, *Federal Review of Voting Changes*) (1975).

¹⁹ 121 Cong. Rec. S 13665 (Daily Ed., July 24, 1975).

²⁰ *Id.*

of minority votes, Section 5 requires that this be done [W]here the non-white population is so large that they will inevitably control at least one district, an attempt may be made to put as many non-white voters as possible in that one district so as to prevent substantial non-white concentrations in the surrounding districts. The application of Section 5 will prevent such overloading of one district" ²¹

The use of such district lines, which divided up concentrations of minority voters and submerged them in predominantly white districts, is an important reason why there are still so few non-white elected officials in section 5 jurisdictions. Only a year ago the Civil Rights Commission observed that "white voters refuse to vote for black candidates solely because of their race".²² The Commission noted that in a variety of areas, including New York City, literature had been used "which exploited the fear and frustrations of white urban dwellers toward minority group members".²³ These problems frequently made it

²¹ Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1039 (1975). See also S. Rep. No. 94-295, p. 18; H. R. Rep. No. 94-196, p. 10; 121 Cong. Rec. S 13340 (Remarks of Sen. Tunney) (Daily Ed., July 22, 1975), S 13400 (Remarks of Sen. Kennedy), S 13402-04 (Remarks of Sens. Byrd, Pastore, and Tunney) (Daily Ed., July 23, 1975), H 4756 (Remarks of Rep. Clay) (Daily Ed., July 2, 1975), H 4830 (Remarks of Rep. Kastenmeier) (Daily Ed., June 3, 1975); Hearings Before A Subcommittee of the State Judiciary Committee, 94th Cong., 1st Sess., 4, 11 (Statement of Rep. Rodino), 29 (Statement of Arthur Flemming), 642-3 (Statement of Armand Derfner) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 8 (Statement of Sen. Scott), 16-17 (Statement of Sen. Hart), 79, 98-99 (Statement of Arthur Flemming), 146 (Statement of Frank Parker), 226 (Statement of Howard Glickstein) (1975).

²² United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 155-56 (1975).

²³ *Id.*

impossible for a minority candidate to win election from a predominantly white district. The House and Senate reports noted that most minority officials in these areas had been elected from districts "with overwhelmingly black populations".²⁴ The Chairman of the Commission on Civil Rights testified:

The presence of substantial black population does not ensure that blacks will be elected to office. For example, there are no blacks elected to any county office in the 191 of 260 counties with 25 to 50 per cent black population. . . . In 90 per cent of the counties in the population group, no blacks sat on county governing boards."²⁵

Application of the Voting Rights Act, particularly where it prevented the fragmentation of a minority community into majority white districts, was regarded by Congress as a major cause of the modest increase in the number of minority officials which had occurred prior to 1975.²⁶ In 1975 Congress renewed the Act until 1982 in the hope that

²⁴ S. Rep. No. 94-295, p. 14; H. R. Rep. 94-196, p. 7.

²⁵ Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 90 (1975).

²⁶ Hearings Before A Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 1 (Statement of Senator Tunney), 3-4 (Statement of Senator Bayh), 8 (Statement of Senator Scott), 13 (Statement of Senator Hart), 21 (Statement of Senator Kennedy), 47 (Statement of Senator Mitchell), 72 (Statement of Senator Mathias), 74, 82, 89-90 (Statement of Arthur Flemming), 108 (Statement of John Lewis), 121 (Statement of Nicholas Katzenbach), 224 (Statement of Howard Glickstein), 539, 586-7 (Statement of J. Stanley Pottinger) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 7 (Statement of Rep. Rodino), 27 35-6, 41 (Statement of Arthur Flemming), 173 (Statement of J. Stanley Pottinger), 330, 337 (Statement of Howard Glickstein) (1975).

it would substantially enlarge the opportunities for non-whites to be elected to public office.²⁷

Congress in 1975 was also familiar with the facts of this case, which were used by the Commission on Civil Rights as an illustration of the way in which section 5 had been applied.²⁸ The decisions of the Attorney General in this case, objecting to the 1972 lines and approving the 1974 lines, were reprinted in both the House and Senate Hearings.²⁹

Petitioners plainly disagree with the reasons which led Congress to renew the Act in 1970 and again in 1975; they insist that white bloc voting no longer exists, that

²⁷ S. Rep. No. 94-295, p. 14; H. R. Rep. No. 94-196, p. 7; 121 Cong. Rec. S 13337-9 (Remarks of Sen. Tunney) (Daily Ed., July 22, 1975), S 13668 (Remarks of Sen. Humphrey), S 13669 (Remarks of Sen. Kennedy) (Daily Ed., July 24, 1975), H 4712, H 4714, H 4717 (Remarks of Rep. Edwards), H 4756 (Remarks of Rep. Clay) (Daily Ed., June 2, 1975), H 4829 (Remarks of Rep. Collins) (Daily Ed., June 3, 1975); Hearings Before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 3-4 (Statement of Sen. Bayh), 9 (Statement of Sen. Scott), 13 (Statement of Sen. Hart), 72 (Statement of Sen. Mathias), 89-90 (Statement of Arthur Flemming), 109 (Statement of John Lewis), 125 (Statement of Nicholas Katzenbach), 127-28, 141-42 (Statement of Frank Parker), 224 (Statement of Howard Glickstein), 539, 586-87 (Statement of J. Stanley Pottinger) (1975); Hearings Before A Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., 7 (Statement of Rep. Rodino), 21-22, 35-36 (Statement of Arthur Flemming), 173 (Statement of J. Stanley Pottinger), 3330, 337 (Statement of Howard Glickstein) (1975); United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 61-67, 337, 377-395 (1975).

²⁸ United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 220-230 (1975).

²⁹ Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., pp. 252-260 (1975); Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., pp. 667-676 (1975).

non-white candidates have an equal opportunity for election in any part of the country, that white elected officials are uniformly as opposed to discrimination as any non-white official would be, and that there is no possible manner in which district lines could have the effect of diluting the value of minority votes. P. Br. 29-42. Substantially similar arguments were unsuccessfully advanced by the appellants in *City of Petersburg v. United States*, 410 U.S. 962 (1973),³⁰ and by those who opposed extension of the Voting Rights Act in 1975.³¹ Were it necessary for the Court to inquire into the merits of these contentions, we believe that they could not be sustained; with regard to Kings County, for example, there is a clear pattern of white bloc voting and non-white candidates have only been elected from overwhelmingly non-white districts. See p. 25, *infra*. But there is no need for such an inquiry, for Congress has already resolved this matter by twice renewing the statute. Congress is, we would suggest, uniquely competent to make such an essentially political assessment of voter attitudes, the manipulability of district lines, and the other problems confronting minority candidates and voters. That assessment was made after extensive committee hearings, extended debate, and careful consideration

³⁰ In *Petersburg* the district court concluded that the annexation of a heavily white area by a city with a slight non-white majority would have a discriminatory effect in violation of section 5. Appellants contended that, regardless of the impact of the annexation on the outcome of the city's at-large elections, it could not be said to dilute the value of minority votes in any legally cognizable sense. Jurisdictional Statement, No. 74-865, pp. 22, 23, 25; Brief For Appellant in Opposition to Motions to Affirm, No. 74-865, pp. 5-6.

³¹ 121 Cong. Rec. H 4744-45 (Daily Ed., June 2, 1975), S 13325-26, 13344, 13357 (Daily Ed., July 22, 1975), S 13378 (Daily Ed., July 23, 1975), S 13589-92 (Daily Ed., July 24, 1975); Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., pp. 145, 683, 710-11 (1975).

of the lengthy report of the Commission on Civil Rights. Congress has also recognized that the factual situation to which the Voting Rights Act is addressed may well change; it has therefore provided that the Act must be renewed from time to time to assure a periodic reevaluation of the relevant circumstances. See *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (Harlan, J. concurring and dissenting).

The congressional findings which underlie the renewal of the Voting Rights Act should be accepted by this Court. The courts are singularly ill equipped to reconsider on a nationwide basis the political and social realities which were well known to Congress. Petitioners offer little more than abstract argument to support their contention that the problems found by Congress do not, or at least should not, exist. Congress was doubtless aware of the fact, greatly stressed by petitioners, that in some instances, largely outside section 5 jurisdictions, non-white candidates had been elected by predominantly white constituencies. Congress was justified, however, in concluding that this salutary development did not necessarily signal the arrival of the millennium. If petitioners believe that the problems which led to the adoption of section 5, have, at least as regards redistricting, abated, that contention should be made to Congress.

C. The Decision of the Attorney General

On January 4, 1974, the District Court for the District of Columbia rescinded New York's exemption from the Voting Rights Act and directed New York to submit its 1972 districting plan to the Attorney General forthwith. That plan was submitted on February 1, 1974. Under the regulations promulgated by the Attorney General any interested member of the public was able to comment on the proposed submission. 28 C.F.R. § 51.12. Because of the

unusual amount of publicity which surrounded the submission,³² the Department of Justice received a substantial amount of such commentary. Both intervenors and the State of New York submitted detailed memoranda regarding the 1972 plan, App. 202-235, 248-256, and numerous public officials wrote to the Attorney General to express their views. App. 237-247. The record in this case is silent as to whether petitioners or their counsel made any oral or written representations to the Attorney General regarding the 1972 lines. See App. 88.

On April 1, 1974, the Attorney General entered an objection to the Senate, Assembly and Congressional lines in Kings County (Brooklyn), and the Senate and Assembly lines in New York County (Manhattan). No objection was made to the Congressional lines in New York County or to any of the lines in Bronx County. The Attorney General concluded that the Kings County lines had precisely the configuration which Congress had intended to prohibit; a small area at the center of the non-white community was placed in districts with virtually no whites, and the balance of the minority community was fragmented into small pieces where were paired with larger white areas in predominantly white districts. The letter of objection stated

First, with respect to the Kings County congressional redistricting the lines defining district 12 and surrounding districts appear to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our analysis reveals none . . .

³² See, e.g., *New York Times*, January 5, 1974, p. 1, col. 8.

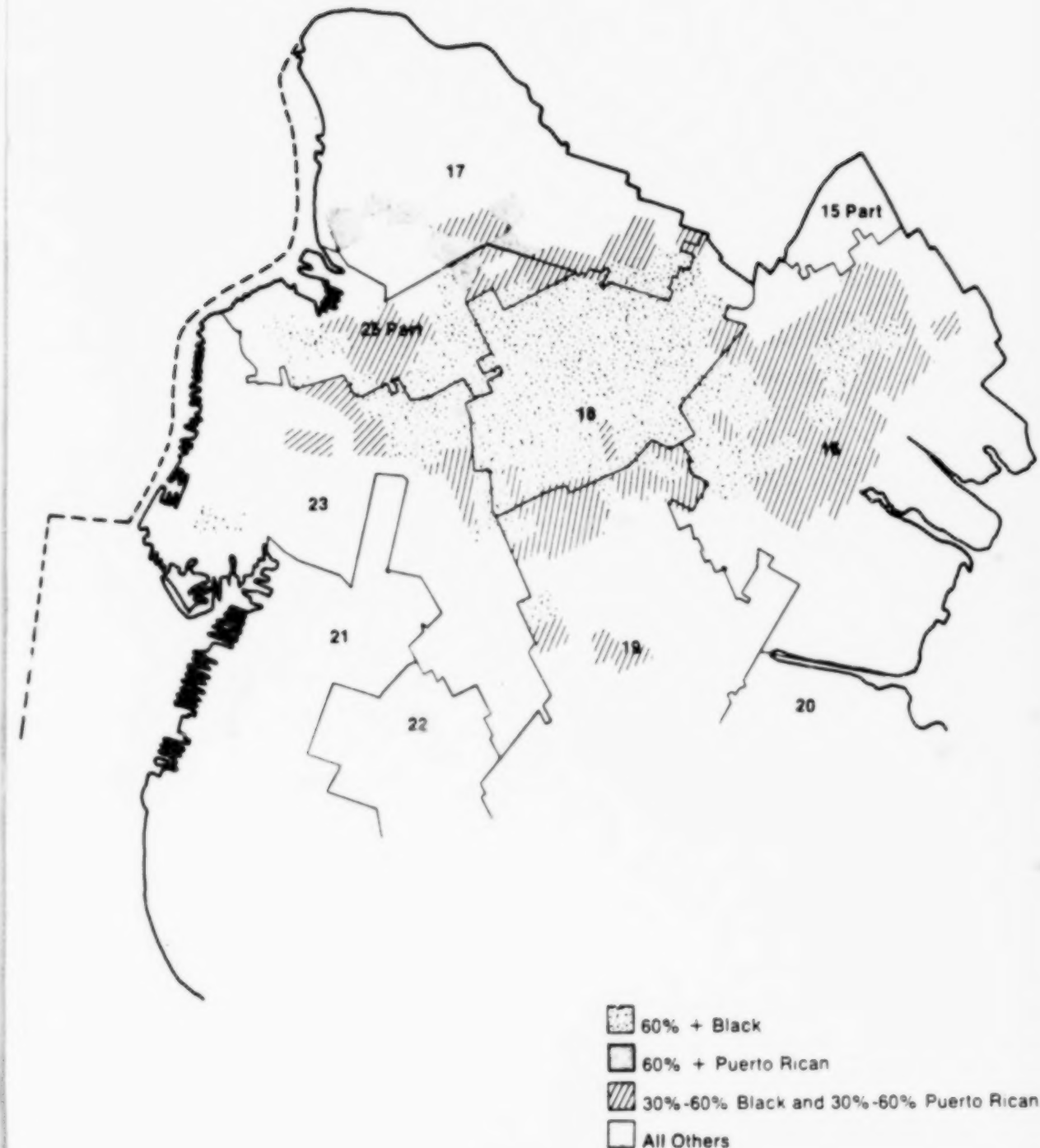
Similarly, in the Kings County Senate and assembly plans, a parallel problem exists. Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. App. 14-15.

The pattern found by the Attorney General is illustrated by the map of the 1972 Senate lines on the opposite page, reprinted from a report of the United States Commission on Civil Rights.³³ Petitioners did not question below the accuracy of the Attorney General's description of the fragmenting effect of the 1972 lines.

The record before the Attorney General fully justified his conclusion that New York had failed to establish that the 1972 lines had no discriminatory effect. The non-white community in Kings County is largely concentrated in a single contiguous area in central Brooklyn, in and around Bedford-Stuyvesant. App. 221. The 1972 lines, however, were drawn in such a way that a majority of non-whites in the county were placed in predominantly white Congressional and Senate districts. The bulk of the non-white community was divided up among 6 majority white Assembly districts, 5 majority white Senate districts, and 4 majority white Congressional districts. App. 222. Not a single white community of any size was in a majority non-white district. The number of non-whites in majority white

³³ The Voting Rights Act: Ten Years After, p. 223 (1975). The map significantly understates the size of the minority community. Since total non-white population is not indicated, areas up to 59% non-white appear as "all others" where neither the black nor Puerto Rican group exceeded 30%.

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districts vastly outnumbered the number of whites in non-white districts.

<i>District</i>	<i>Non-whites in Majority White Districts</i>	<i>Whites in Majority Non-white Districts</i>
Congressional	455,862	93,547
Senate	574,811	44,081
Assembly	361,707	135,260

App. 220. These figures contrasted with the situation in Bronx County, where the numbers of whites in predominantly non-white districts was only slightly smaller than the number of non-whites in predominantly white districts. *Id.*

This fragmentation of the minority community clearly affected the number of district with non-white majorities. The number of non-whites siphoned off from the Bedford-Stuyvesant ghetto was equal to the population of 2 Assembly districts, 2 Senate districts, or 1 Congressional district. App. 222. The proportion of districts with non-white majorities, and in which a non-white candidate would thus have a reasonable opportunity for election, was substantially smaller than the proportion of the County population that was non-white. App. 233.³⁴ The non-white districts in the center of the ghetto were substantially more compact than the predominantly white districts which paired portions of the minority community with larger white areas miles away. App. 224. Several leading black and Puerto Rican political leaders submitted detailed written statements to the Attorney General objecting to the division of the minority community and alleging that it was the result of deliberate racial gerrymandering "so that

³⁴ For example, non-whites constituted 35.6% of the County but only 11.7% of the Senate districts had a non-white majority.

the number of districts with Black and Puerto Rican majorities is kept to a minimum." App. 237-247.

The record before the Attorney General contained ample evidence of racially polarized voting. With the exception of the Borough President of Manhattan, who had run unopposed, not a single majority white district in the City of New York was represented by a Black or Puerto Rican. No Black or Puerto Rican had ever been elected to state-wide or city-wide office. App. 212. Election results of races between white and non-white candidates showed a substantial correlation between the vote received by the white candidate and the white population of the area involved. App. 213-216.

This evidence led the Attorney General to enter an objection to district lines which clearly minimized non-white voting strength in Kings County. In the proceedings below petitioners did not question the accuracy of the evidence before the Attorney General, nor allege the existence of additional evidence with regard to the 1972 lines which he inexcusably failed to consider. Those of petitioners' witnesses who discussed the matter agreed that the fragmentation of a non-white community would have an "adverse effect" on minority voters, App. 32, 60, 67, and one of those witnesses testified that "blacks and Puerto Ricans had been gerrymandered in the past." App. 62.

D. Absence of Discriminatory Effect

Following the Attorney General's objection to the 1972 lines, New York declined to seek to validate those lines through further litigation, but chose instead to adopt new district lines which would be free of the defects which tainted the 1972 plan.³⁵ On May 29 and 30, 1970, the Legis-

³⁵ New York could have brought suit in the United States District Court for the District of Columbia to obtain a declaratory judg-

lature adopted new Assembly, Senate and Congressional lines in Kings County and new Assembly and Senate lines in New York County. These new lines substantially reduced the fragmentation of the minority community, increased the number of predominantly non-white districts, and roughly equalized the number of whites in majority non-white districts and the number of non-whites in predominantly white districts. The Attorney General approved these 1974 lines on July 1, 1974. App. 282-302.

The 1974 lines did not have the effect of discriminating against whites. Kings County is clearly not a county in which whites have been "excluded from participation in political life" or been "effectively removed from the political process." *White v. Regester*, 412 U.S. 755, 769 (1973). Whites constitute 64.9% of the county population; under the 1974 redistricting plan they are a majority of 68.6% of the Assembly districts and 70.0% of the Senate districts. Among the officials elected under the 1974 lines, 77.2% of the Assemblymen are white and 80% of the Senators are white. The 1974 redistricting resulted in five new districts in which non-whites were for the first time a majority; in the succeeding election white candidates won the elections

ment that the 1972 lines did not have a discriminatory purpose or effect. In view of the Attorney General's expertise, and his application of the same standards applied in court, few jurisdictions have chosen to pursue such litigation. In the first 10 years of the Act, the Attorney General interposed 163 objections. Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., p. 185 (1975). The submitting authority has only sought to challenge that determination in three instances. *City of Petersburg v. United States*, 410 U.S. 962 (1973); *Beer v. United States*, No. 73-1869; *City of Richmond v. United States*, 422 U.S. 358 (1975) (Although Richmond initially sought to overturn the Attorney General's decision objecting to annexation as such, it subsequently conceded the correctness of that decision; the bulk of the litigation dealt with a dispute between Richmond and certain intervenors as to which ward plan should be adopted).

in four of these.³⁶ The four officials elected on a countywide basis are all white,³⁷ as are the Democratic and Republican County Chairmen. There is no history in the county of disproportionately low levels of white education, employment, registration or voting. Compare *White v. Regester*, 412 U.S. at 768.

The 1974 lines did not have the effect of "maximizing" the number of districts in which non-white candidates were assured of election. With regard to the Congressional and Assembly lines the number of non-white legislators elected under the 1972 and 1974 lines was unchanged. It clearly would have been possible to draw lines more favorable to non-whites. The minority population of the 14th Congressional district, which now as before is represented by a white, could have been substantially increased; the Attorney General expressly declined to insist that this be done. App. 294-297. The minority population of the 57th Assembly district could as readily have been raised from 65.0% to 80.4%, but the Legislature chose not to do so. Compare App. 122-23 with App. 277.

Petitioners do not assert that, because of their religion or ancestry, they should enjoy rights not accorded to other whites. P. Br. 6, n. 6. One group of amici, however, do urge that, because of the persecution of the Hassidim in Europe during World War II, these whites are different from all

³⁶ The 57th and 59th Assembly districts, 17th and 23rd Senate districts, and the 14th Congressional district.

Whites are a majority of 16 Assembly districts, numbers 38, 39, 40-52, and 58, and of 7 Senate districts, 15, 16, 19-22, and 25. Non-whites are a majority of 7 Assembly districts, numbers 40, 53-57, and 59, and of 3 Senate districts, 17, 18 and 23, App. 179-80, 195. Whites represent all the majority white districts as well as Assembly districts 57 and 59 and Senate districts 17 and 23.

³⁷ Borough President, District Attorney, and two City Councilmen.

other whites.³³ Regardless of whether the state could take into consideration that history of persecution in fashioning laws which might help to overcome the lingering effects of those tragic events, such a policy is not constitutionally required, and cannot be relied on to avoid the state's responsibilities under the Voting Rights Act.

Petitioners do not claim that the 1974 lines so emasculated white voting strength in Kings County as to violate *White v. Regester*, 412 U.S. 755 (1973). Their objection is solely to the purpose which motivated the Legislature to draw these particular lines. Had the 1974 district lines, or the division of the Hassidic community, been the result of "racially neutral" criteria, such as shaping the most compact contiguous districts, petitioners presumably would not question the validity of such lines.

E. Cause of the Alleged Injury

On June 11, 1974, petitioners commenced this action in the United States District Court for the Eastern District of New York. They alleged that the 1974 Senate and Assembly lines had divided the Hassidic community in Williamsburgh and thus "diluted" the voting power of the Hassidic plaintiffs. App. 11. The exclusive cause of this division was asserted to be that the Legislature, in drawing those lines, had sought to assure that at least 65% of the residents of certain districts were non-white. App. 10. The use of such a "quota", or any other consideration of race, was alleged to be unconstitutional. App. 11. Both the district court and the court of appeals held that New York could constitutionally consider the racial composition of the 1974 lines in fashioning a remedy for the discriminatory 1972 lines. Neither court, therefore, found it necessary to

³³ Brief Amicus Curiae of Board for Legal Assistance to the Jewish Poor, pp. 34, 50-52.

decide whether the alleged "quota" was in fact the cause of the alleged harm to petitioners.

The only injury of which petitioners complain is that their community, although wholly within a single congressional district, is divided between two Senate districts and two Assembly districts. P. Br. 13, 24; App. 11, 46, 67, 260-261. Although alleging that the congressional lines were fashioned in the same manner as the Senate and Assembly lines, petitioners do not seek to overturn the former since they are located entirely within a single congressional district. Petition, p. 18a, n. 10. The petitioners in the district court expressly disclaimed any concern with whether the district in which they were placed had a non-white majority, so long as the entire Hassidic community was in a single district. App. 46, 83, 87. Petitioners maintain that the sole reason the Hassidic community was divided in half was because of the alleged 65% rule. P. Br. 24; App. 11, 261.

The record, however, clearly demonstrates that the division of the Hassidic community was *not* caused by the alleged quota. Under the present plan the community is divided between the 57th Assembly District, with a 65% non-white population, and the 56th Assembly District, with an 88.1% non-white population. App. 195. Mr. Scolaro, the Executive Director of the Joint Legislative Committee on Reapportionment, testified that it would have been possible to keep the Hassidic community intact by placing it in the 56th district:

- Q. Now, did you consider putting the entire Hassidic community in the 56th Assembly district?
- A. That was one variable that we came up with, yes, and that would require a moving of a portion of the Hassidic community which is presently in the

57th district, totally into the 56th district, and that would have resulted, to the best of my knowledge, in two districts, both of which would be over 65 percent non-white.

App. 122. Intervenor introduced in the district court a plan drawn in the manner described by Scolaro, which would have placed the entire Hassidic community in a single district without violating any 65% rule. App. 270-278. Similarly, Scolaro testified it would have been possible to draw Senate lines which placed the entire Hassidic community in a single district while complying with the alleged 65% requirement:

Q. Would it be, would it have been or would it be possible to redraw the Senate lines so that the entire Hassidic community was within a single Senatorial district and still comply with the 65 percent requirement?

A. You are dealing with such a large number in the Senatorial district, 304,000 people, that I am sure there would be a way. . .

App. 124.³⁹

The actual reason for dividing the Hassidic community, at least with regard to the Assembly districts, was a desire to minimize the number of whites who would be in a heavily non-white district. Scolaro stated, with regard to placing the entire community in the 56th Assembly district:

³⁹ Plaintiff's Motion for Summary Judgment asserted that there was no genuine issue as to whether the 65 percent rule was the sole reason for dividing the community. App. 261. Intervenor's Statement of Material Issues as to Which There is a Genuine Dispute expressly controverted that contention, and referred to Scolaro's testimony. App. 279-280.

A. The only white community in this whole community would be the Hassidic Jewish community, there would be no other whites.

Q. But, Mr. Scolaro, in hindsight, it would have been possible under that scheme to both comply with the Justice Department 65 percent standard, if that was their standard, and keep the Hassidic community together?

A. Yes, sir, but it was my judgment in trying to apply the Department of Justice overall criteria that that would definitely make no representation for the Hassidic community at all and that it would be such a minority group in an overwhelmingly black area that they would have not had any representation. They would compose approximately 25,000 people out of 121,000 people and 90,000 of those 121,000 or more would be black.

App. 121-122. This testimony is supported by evidence presented to the Attorney General that the 1972 lines were also drawn so as to avoid placing whites in majority non-white districts. App. 218-224. Although Scolaro suggested this division of the Hassidic community was in its best interest, the petitioners obviously believe otherwise.

This critical failure of proof requires dismissal of this action, regardless of whether there was a 65% "quota" or whether such a "quota" would be constitutional. The quota which petitioners seek to attack simply is not the cause of their injury. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Petitioners remain free, if they wish, to seek to consolidate their community in the 56th Assembly district by commencing a new action challenging the constitutionality of Scolaro's desire to avoid placing Hassidim in a heavily non-white district.

ARGUMENT

Petitioners advance three arguments in support of their contention that the 1974 district lines are unconstitutional: (1) that in adopting election laws, even to remedy past discrimination, a state must close its eyes to the racial impact of the proposed legislation, (2) that the Attorney General's decision of April 1, 1974, provides no basis for the 1974 plan since there was no authoritative finding that the 1972 plan had a discriminatory purpose, and (3) that the Legislature used an impermissible "quota" in fashioning the 1974 lines. We examine each of these grounds in turn.

I.

The New York Legislature Was Obligated to Take Into Account the Racial Composition of the Affected Districts in Drawing the 1974 District Lines.

Petitioners' first, and most broadly stated, contention is that "there is *never* any justification for race-consciousness in the electoral process", not even "to undo the effects of past discrimination" or to prevent its 'perpetuation.'" P. Br. 21. Petitioners do not attempt to argue that taking account of race in fashioning remedies for past racial discrimination is constitutionally impermissible across the board. They necessarily concede that, in fashioning remedies for racial discrimination in other sectors of American life, both this Court and numerous lower courts have concluded that race must be considered.⁴⁰ Petitioners

⁴⁰ This Court mandated such consideration to formulate an effective remedy for school segregation in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), and *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45 (1974) and for discrimination in faculty assignments, *United*

do not, of course, deny that it is usually imperative to know the race of the persons affected in order to determine whether a challenged practice is discriminatory in nature.

In scrutinizing both the 1972 and 1974 district lines the Attorney General could not assess whether they minimized minority voting strength and thus had a discriminatory effect without knowing the racial composition of the districts involved. The applicable regulations require the submitting authority to furnish the Attorney General with the "population distribution by race within the proposed units" and, where available, with the "[v]oting age population and the number of registered voters" by race in the districts involved. 28 C.F.R. §51.10(b)(5)-(6). In both *City of Petersburg v. United States*, 410 U.S. 962 (1973) and *City of Richmond v. United States*, 422 U.S. 358 (1975), this Court was required in assessing the effect of a proposed annexation to consider the racial composition of both the original city and the area to be annexed, in order to determine whether the annexation "would create or perpetuate a white majority in the city." 422 U.S. at

States v. Montgomery County Board of Education, 395 U.S. 225 (1969). The lower courts have done so in such diverse areas as urban renewal, public housing, employment and jury selection. *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied* 401 U.S. 1010 (1971); *Heyward v. Public Housing Administration*, 238 F.2d (5th Cir. 1956); *Boston N.A.A.C.P. v. Beecher*, 504 F.2d 1017, 1026-27 (1st Cir. 1974); *Castro v. Beecher*, 459 F.2d 725, 737 (1st Cir. 1972); *N.A.A.C.P. v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053, 1056, *cert. denied* 419 U.S. 895 (1974); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir.) *cert. denied* 406 U.S. 950 (1972); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966).

368.⁴¹ Petitioners do not, of course, contend that the constitution directs the Attorney General to ignore the racial composition of districts whose effect on minority voters he is obligated to scrutinize.

In fashioning its 1974 districting plan, the New York Legislature was not obligated to close its eyes to the very facts which it was required to disclose to the Attorney General and which the Attorney General was compelled to consider in reviewing that plan. Just as the racial compositions of the 1972 districts had been considered in determining whether the 1972 lines violated section 5 of the Voting Rights Act, "so also must race be considered in formulating a remedy." *North Carolina Board of Education v. Swann*, 402 U.S. 43, 46 (1971). It would have been irresponsible for New York to have adopted a series of district plans at random, without regard to whether they minimized minority voting strength, until it stumbled across a plan without the forbidden effect. Petitioners do not suggest New York should have enacted plans at random, nor do they suggest any other way in which the state could have remedied the defects of the 1972 lines. To correct a districting plan which has the effect of unlawfully minimizing minority voting strength, a redistricting plan must take into account the perceived illegality.

⁴¹ *Georgia v. United States*, 411 U.S. 526 (1973), furnishes another example of the "race-consciousness" required in a Section 5 proceeding. To facilitate its evaluation of a 1971 Georgia reapportionment proposal, "The Justice Department asked for census maps of the 1964 and 1968 House districts; the distribution of white and non-white populations within the 1964, 1968, and 1971 districts; a history of the primary and general elections in which Negro candidates ran; data, including race, with respect to all elected state representatives; and the legislative history of all redistricting bills." *Id.* at 529 n. 4. This Court observed that "There is no serious claim in this case that the additional information requested was unnecessary or irrelevant to Section 5 evaluation of the submitted reapportionment plan." *Id.* at 540.

The success of the new plan can only be measured by the extent to which it remedies the illegal fragmentation of racial minorities. To require a state to ignore the racial distribution of the affected populace would be to frustrate any good faith effort to comply with section 5; to forbid the Attorney General in appraising a proposed plan to consider that distribution would be to frustrate, not only the vital objective which Congress sought to achieve in adopting and twice re-enacting the Voting Rights Act of 1965, but also the constitutional policies which underlie the Act.

This common sense view of the state's responsibility in fashioning a remedy for the discriminatory 1972 lines corresponds with the understanding of Congress. In a memorandum submitted to the Senate Subcommittee on Constitutional Rights in May of 1975, when that Subcommittee was considering legislation to extend the Voting Rights Act, Professor Howard A. Glickstein, formerly Staff Director of the United States Commission on Civil Rights, stated:

Obviously, in order for local officials to evaluate the potential discriminatory effects of the redistricting plans they draft, it is necessary that they take into account the racial makeup of each of the districts. Otherwise, it would be impossible to assess the impact of redistricting plans which are subject to the Section 5 standards.⁴²

On July 24, 1975, in the course of Senate debate on the bill shortly thereafter enacted to extend the Voting Rights Act, Senator Bayh referred to Professor Glickstein's pres-

⁴² Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., First Sess. 1039 (1975).

entation as embodying "the committee's interpretation of the legal standards for redistricting cases under Section 5." P. 15, n. 20, *supra*.

A recent example of the way in which local officials, the Attorney General, and this Court all "take into account the racial makeup of each of the districts" in fashioning a remedy is *City of Richmond v. United States*, 422 U.S. 358 (1975). There the City of Richmond had proposed to annex a predominantly white area which would have reduced the black population of the City from 52% to 42%, thus significantly lessening black voting strength in at-large City Council elections. The Attorney General objected to the annexation on the ground that it thus had a discriminatory effect, but suggested that this defect might be overcome by an appropriate single-member district plan. 422 U.S. at 364. Richmond thereupon adopted a single-member district plan designed to overcome the discriminatory impact of the annexation itself, which was approved by both the Attorney General and this Court. In sustaining Richmond's plan this Court pursued exactly the sort of inquiry into the racial composition of the proposed districts which petitioners contend is constitutionally impermissible:

We are also convinced that the annexation now before us, in the context of the ward system of election finally proposed by the city and then agreed to by the United States, does not have the effect prohibited by Section 5. The findings on which this case was decided and is presented to us were that the post-annexation population of the city was 42% Negro as compared with 52% prior to annexation. The nine-ward system finally submitted by the city included four wards each of which had a greater than 64% black majority. Four wards were heavily white. The

ninth had a black population of 40.9%. In our view, such a plan does not under-value the black strength in the community after annexation; and we hold that the annexation in this context does not have the effect of denying or abridging the right to vote within the meaning of Section 5. 422 U.S. at 371-72.

Absent the remedial "race-consciousness" of the Richmond City Council, the Attorney General and this Court, the vital purposes of the Voting Rights Act—and of the Fourteenth and Fifteenth Amendments, which the Act is designed to implement—could not have been faithfully carried out.

II.

The Decision of the Attorney General Was Lawful and Required New York to Remedy the Minimization of Minority Voting Strength Which Tainted the 1972 District Lines.

Petitioners expressly recognize that, as the court below held, the correctness of the Attorney General's decision cannot be challenged by an attack on the resulting remedy. P. Br. 51; Petition, p. 9, n. 3. The record before the Attorney General left little doubt that the 1972 district lines had minimized minority voting strength. See pp. 20-25, *supra*. Petitioners maintain, however, that even if the decision was correct, it did not warrant the enactment of any remedy. Petitioners object that the decision was insufficient to justify any remedy, because (1) it rested on the state's failure to meet its burden of proving that the 1972 lines were not discriminatory, (2) it contained no finding or discussion as to the purpose of the 1972 lines, and (3) it did not purport to conclude that the 1972 lines were unconstitutional.

Petitioners are, of course, right in noting that the Attorney General's decision was cast in the form of a conclusion that New York had not sustained its burden of proving that the 1972 lines did not have a discriminatory effect. But petitioners' argument that a finding in this posture was ineffective to require New York to undertake remedial action is wholly unavailing. The applicable regulations clearly require the Attorney General to disapprove a submission where the submitting authority fails to meet this burden of proof. 28 C.F.R. §51.19.⁴³ This Court in *South Carolina v. Katzenbach*, 382 U.S. 301, 335 (1966), expressly recognized that in section 5 actions brought in the District Court for the District of Columbia by a state or local government seeking approval of a new law the Voting Rights Act places "the burden of proof on the areas seeking relief." In *Georgia v. United States*, 411 U.S. 526 (1973), this Court upheld the validity of the regulation adopted by the Attorney General imposing the same burden of proof on those submitting jurisdictions which elect to pursue the section 5 alternative of pre-clearance by the Attorney General. 411 U.S. at 536-39.

It is true that in *Georgia v. United States* three members of this Court dissented. 411 U.S. at 542-45. But only last year Congress voted to extend the Voting Rights Act without altering section 5 in this regard. In 1975 Congress took express note of this Court's decision in *Georgia v. United States*⁴⁴ and of the existence of the regulation in

⁴³ "If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

⁴⁴ H.R. Rep. No. 94-196, 94th Cong. 1st Sess., pp. 9-10; S. Rep. No. 94-295, 94th Cong. 1st Sess., pp. 16-17.

question,⁴⁵ and must be deemed in renewing the Act to have approved both. Indeed, the letter of the Assistant Attorney General disapproving the 1972 lines in this very case was itself referred to during, and reprinted with, the 1975 House and Senate Hearings.⁴⁶ Congress also knew that it is the general practice of the Attorney General, mindful of the sensitivities of the local officials involved, to phrase objection letters in terms of a failure to meet a burden of proof, rather than making an express finding of discriminatory effect.⁴⁷ Congress "had ample opportunity to amend the statute"; its failure to do so compels the conclusion that *Georgia v. United States*, had "correctly interpreted the Congressional design." *Georgia v. United States*, 411 U.S. at 526.⁴⁸

⁴⁵ S. Rep. No. 94-295, p. 16 (1975); H. R. Rep. No. 94-196, p. 8 (1975). The Regulations were reprinted in both the House and Senate Hearings. Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess. pp. 186, 192 (1975); Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong. 1st Sess., pp. 601, 607 (1975).

⁴⁶ Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., p. 252 (1975); Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., p. 667 (1975).

⁴⁷ Counsel for Intervenors have reviewed over 100 objection letters entered by the Attorney General during the last four years. In virtually every case the Attorney General phrased the letter as a holding that he was "unable to conclude" that the submission would not have a discriminatory effect, rather than as a holding that the submission would indeed have such a discriminatory effect. The letters are a matter of public record and are on file in the Voting Rights Section of the Civil Rights Division.

⁴⁸ In *Allen v. State Board of Elections* this Court construed section 5 to cover "any state enactment which altered the election law of a covered State in even a minor way." 393 U.S. 544, 566 (1969). When Congress renewed section 5 in 1970 without change this Court concluded that such renewal confirmed the correctness of its decision in *Allen*, and thus applied section 5 to redistricting in *Georgia v. United States*.

Petitioners also attack the sufficiency of the Attorney General's decision on the ground that it contained no finding as to the purpose of the 1972 lines.⁴⁹ P.Br. 10, 42-43. But section 5 of the Voting Rights Act is not limited in its application to election laws that are motivated by racial malice. The Act requires that, prior to the enforcement of a new election practice or procedure, the state must prove that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (Emphasis added). The regulations promulgated by the Attorney General in carrying out section 5 also require the state to establish that the submitted law "does not have a discriminatory purpose or effect." 28 C.F.R. § 51.19. In *City of Richmond v. United States*, 422 U.S. 358 (1975), this Court recognized that section 5 forbids both discriminatory purpose and discriminatory effect and dealt with those issues separately.

Professor Glickstein's Memorandum stated that "when any of these jurisdictions decide to alter their district lines, section 5 places the burden on them of proving that their redistricting plans have neither the purpose nor effect of racial discrimination. The Attorney General looks principally to the potential effects of redistricting plans in making his section 5 determinations" ⁵⁰ (Emphasis in original). Virtually all of the objections entered by the Attorney General since 1965 have been based on the effect of the proposed law, rather than its purpose.⁵¹ As this Court

⁴⁹ This argument appears to have been unsuccessfully advanced in *City of Petersburg v. United States*, 410 U.S. 962 (1973). See Jurisdictional Statement, No. 74-865, pp. 13, 23, 23-24, nn. 10, 29.

⁵⁰ Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., p. 1039 (1975).

⁵¹ See n. 47, *supra*. Counsel have been able to identify only a single instance in which the Attorney General based an objection on a discriminatory purpose. Letter of J. Stanley Pottinger to Luther L. Britt, June 2, 1975.

noted in *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972), "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." ⁵²

Petitioners urge, finally, that New York could not fashion a remedy for any defects in the 1972 lines unless those defects constituted violations of the Fourteenth and Fifteenth Amendments as defined in *White v. Regester*, 412 U.S. 755 (1973).⁵³ But this contention depends in its entirety on treating as a legal nullity the Attorney General's decision that the 1972 lines violated section 5 of the Voting Rights Act. Once the Attorney General determines that a redistricting plan transgresses the statutory standard established by the Voting Rights Act, the question whether the plan also transgresses constitutional standards has no independent legal significance. Section 5 was deliberately adopted to set a more stringent statutory standard for redistricting plans than had theretofore been required under the Constitution alone. During the 1969-70 hearings on renewal of the Voting Rights Act, the Attorney General repeatedly testified that a ban on any "discriminatory purpose or effect" was broader than the unelaborated consti-

⁵² Neither the Fourteenth nor Fifteenth Amendment purports on its face to be limited to acts of deliberate discrimination. In *Gray v. Sanders*, 372 U.S. 368 (1963) and its progeny, as in *White v. Regester*, 412 U.S. 755, 765-69 (1973), this Court struck down district plans as unconstitutional solely because of their effect. In other areas of the law the courts have come to focus primarily on the potentially adverse impact of a challenged practice, regardless of its purpose. See *Carmical v. Craven*, 457 F.2d 582, 587 (9th Cir. 1971) (jury selection); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968) (urban renewal relocation); *Hobson v. Hansen*, 269 F.Supp. 401, 497 (D.D.C. 1967) (pupil assignments).

⁵³ The argument that the less stringent constitutional standards should be applied in section 5 cases was advanced, unsuccessfully, in *City of Petersburg v. United States*, 410 U.S. 962 (1973). See Jurisdictional Statement, No. 74-865, pp. 10, 23, 26.

tutional prohibition.⁵⁴ In 1975 Senator Bayh noted in the debate leading to the extension of the Voting Rights Act that "Section 5 is designed to go beyond the constitutional standard required by the 14th and 15th amendments and is justified as necessary to put a stop to the practice of gerrymandering districts or adopting at-large systems so that blacks rarely or never win elections."⁵⁵ Once a districting plan has been held defective under the stringent test established by section 5, those defects can and must be remedied regardless of whether the plan is constitutional.

Petitioners' contention is, as a practical matter, foreclosed by this Court's decisions in *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and *Georgia v. United States*, 411 U.S. 526 (1973). In *Allen* the plaintiffs sought to enjoin the use of certain new election laws in section 5 jurisdictions on the ground that the laws had not been approved by, indeed had not been submitted to, the Attorney General or the District Court for the District of Columbia. This Court held that use of the new procedures had to be enjoined, regardless of their merits, if such approval had not been obtained. The Court stressed that in directing the district courts to enjoin implementation of the laws involved it would not consider whether or not the changes have "a discriminatory purpose or effect . . . [W]e express no view on the merits of these enactments; we also emphasize that our decision indicates no opinion concerning their constitutionality." 393 U.S. at 570-71. In *Georgia v. United States* the United States sued to enjoin the use of

⁵⁴ Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 91st Cong., 1st Sess., p. 280 (1969); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., pp. 189-190 (1969-70).

⁵⁵ 121 Cong. Rec. S 13665 (Daily Ed., July 24, 1975).

new district lines; the lines had previously been submitted to and rejected by the Attorney General. The Court concluded that, since the new lines were covered by section 5 and lacked the requisite approval, their use must be forbidden. Again no inquiry was made, or warranted, into the merits of the plan. 411 U.S. at 541. In the instant case the failure of the Attorney General to approve the 1972 district lines made their use *per se* unlawful, and any attempt to hold elections using these lines would have been enjoined by an appropriate federal court without consideration of their constitutionality or the correctness of the Attorney General's decision. Since New York was thus precluded from using the 1972 lines, it follows *a fortiori* that New York was free, and indeed obligated, to adopt legislation remedying the defects in those lines.

The only significant difference between the Attorney General's objection in the instant case, and the dozens of objections entered by him in other reapportionment cases, is that the redistricting involved here occurred in a jurisdiction outside the South. Thus, petitioners insist that New York does not have the "history of official racial discrimination" that is common in southern cities like New Orleans. P. Br. 49. They urge that the only basis for applying the Voting Rights Act to New York is not any substantive problem with the state's literacy test, but only a minor difficulty regarding the right of Puerto Ricans to bilingual ballots. P. Br. 47. Petitioners contend that white bloc voting cannot be present here since blacks have won elections in white areas of California, Massachusetts, and other northern states. P. Br. 32-33. Intervenor maintain these contentions are factually incorrect. The problems of racial discrimination in New York City, though more subtle than in other states, are equally serious, and the federal courts

have been compelled to deal with them in elections,⁵⁶ public employment,⁵⁷ private employment,⁵⁸ and school segregation.⁵⁹ Rescission of New York's exemption from Voting Rights Act was successfully sought in 1974 on the grounds that its literacy test had had the same discriminatory impact on non-whites in New York as had literacy tests in the South. See pp. 9-11, *supra*. The presence of white bloc voting against non-white candidates in New York is regrettably clear. See pp. 24-25, *supra*; App. 212-217.

More fundamentally, the Voting Rights Act was not intended as a form of regional legislation, applying only to the South. The formula in section 4 literally covers the entire country, and Congress modified that provision in 1970 for the express purpose of applying section 5 to New York. *N.A.A.C.P. v New York*, 413 U.S. 345 (1973). To adopt the distinctions urged by petitioners would be to render the Voting Rights Act a provision of "merely regional application". *Keyes v. School District No. 1*, 413 U.S. 189, 219 (1973) (Powell, J., concurring and dissenting).

⁵⁶ See, e.g., *Coalition For Education v. Board of Elections*, 370 F.Supp. 42 (S.D.N.Y. 1974), *aff'd* 495 F.2d 1090 (2d Cir. 1974).

⁵⁷ See, e.g., *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973).

⁵⁸ See, e.g., *Patterson v. Newspaper and Mail Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975); *Rios v. Enterprise Association Steamfitters*, 501 F.2d 622 (2d Cir. 1974).

⁵⁹ See, e.g., *Hart v. Community School Board*, 383 F.Supp. 699 (E.D.N.Y. 1974), *aff'd* 512 F.2d 37 (2d Cir. 1975).

III.

The 1974 District Lines Were An Appropriate Remedy.

The appropriateness of the 1974 lines as a remedy for the discriminatory effect of the 1972 lines depends on the precise nature of the unlawful aspects of those earlier lines. The record before the Attorney General revealed three related problems. (1) The bulk of the compact and contiguous non-white community had been fragmented into small pieces which were paired with larger white areas in majority white districts. (2) The number of non-whites in majority white districts was several times higher than the number of whites in majority non-white districts. (3) The proportion of districts in which a non-white candidate would have a reasonable opportunity to win election was substantially lower than the proportion of the county population which is non-white. These problems are, as a practical matter, so interrelated that a solution to one would tend to solve the others as well.

In assessing whether any or all of these defects had been overcome by the 1974 lines, both New York and the Attorney General had to know for each district whether a majority of the eligible voting age population was white or non-white. 28 C.F.R. §51.10. Without this information they could not determine whether a particular portion of the non-white community was in a majority white or majority non-white district, whether a non-white candidate would stand a reasonable chance of election in a particular district, or whether the number of non-whites in majority white districts greatly exceeded the number of whites in majority non-white districts.

But the 1970 Census was conducted in such a way as to make it impossible to determine readily the white or

non-white eligible voting age population of a proposed district. The available census data presents three distinct problems. First, the proportion of the total white population in Kings County which is of voting age is approximately 20% higher than the proportion of the total non-white population which is of voting age. App. 263. Second, because of a problem of double counting, there is uncertainty as to the racial composition of the total population of each district. The Census Bureau has devised two different methods of calculation: the "February Formula," which is a high estimate of the minority population, and the "January Formula," a lower projection. The actual figure lies somewhere in between. App. 265-268. Thus under the 1972 lines the 57th Assembly district was 61.2% non-white according to the February Formula and 50.3% according to the January Formula. App. 265-68. Third, these problems are compounded by the fact that the mobility rate among non-whites in Kings County is higher than among whites, so that a greater proportion of the former are ineligible to vote in primary elections because of New York's unusual residence requirement. App. 264;⁶⁰ *Rosario v. Rockefeller*, 410 U.S. 752, 759, n. 9 (1973). Both New York and the Attorney General were aware of these problems.⁶¹

The figures used by the Legislature in the preparation of the 1974 lines were February Formula estimates not adjusted for differences in age distribution or mobility. The factual problem which confronted both the Attorney General and the Legislature was to estimate what level

⁶⁰ The columns in this table are incorrectly headed. The left column is the white population and the right column is the non-white population.

⁶¹ See App. 98, 102, 219.

of unadjusted February Formula minority population corresponded to a 50% non-white eligible voting age population. Under the circumstances it was reasonable to conclude that a district in which the white and non-white eligible voting age populations were equal would have an unadjusted February Formula non-white total population in excess of 65%. Petitioners did not assert in the courts below that this statistical inference was inaccurate.

For the reasons set out in part I of our argument it was not only possible but imperative for New York and the Attorney General, in considering whether proposed districts were free from the discriminatory defects of the 1972 lines, to know for each district whether whites or non-whites were a majority of the eligible voting age population. It is somewhat unclear precisely what statistical approach was used by New York to determine the voting age majority of a district. Petitioners urge there was a rigid 65% rule, but the new congressional district was less than 65% non-white, App. 179. Moreover, the report of the Joint Legislative Committee states merely that the total population non-white majority should be "substantial." App. 179. The United States expressly denies having taken any position as to what size non-white total population majority was comparable to equal voting age population.⁶²

In sum, the record does not demonstrate with certainty the exact statistical assumption underlying the 1974 lines. But the 1974 lines did substantially undo the discriminatory effect of the 1972 lines. Under the 1974 district lines the fragmentation of the minority community was significantly reduced. The number of districts in which the non-white eligible voting age population was at least equal to the white eligible voting age population, and in which a

⁶² Brief For the United States In Opposition, p. 7.

non-white candidate would thus have a reasonable opportunity to win election, was increased. The number of non-white voters in predominantly white districts was lowered to a level roughly equal to the number of whites in predominantly non-white districts.

Petitioners and the dissenting judge in the court of appeals assail the alleged 65% "quota" as a device to assure non-white domination of the new districts or to guarantee non-white control while not "wasting" unnecessary minority voters.⁶³ Such a device, whatever its constitutionality, is not present here. Any 65% standard, if indeed one was utilized, was only a guideline for projecting when white and non-white eligible voting age populations were equal and the resulting district would be one in which non-white candidates would enjoy a reasonably equal opportunity to win election to public office. It certainly did not guarantee non-white domination or control. Non-white candidates were defeated in four of the five new districts; the only district which elected a non-white candidate was the 23rd Senate district whose total population was 71.1% non-white. App. 180. Petitioners urge that it would be unconstitutional to go beyond lines that were "racially fair" to maximize non-white representation as a means of compensation for some past wrong. P. Br. 36-38. Whatever the validity of such a hypothetical plan, those simply are not the facts of this case. Both the intervenors in opposing the 1972 lines, App. 231, and the Attorney General in approving the 1974 lines, App. 298, disclaimed any intent to maximize non-white representation. The Attorney General insisted:

[T]he Voting Rights Act does not guarantee that any particular candidate be elected. . . . What it does do is

⁶³ Petition 32a-50a; P.Br. 54-55.

assure that the *opportunity* of the affected minorities to participate freely in the electoral process, and thus elect a candidate of their choice, should not be unlawfully abridged. . . . The law does not require the state to "maximize" minority voting strength. . . .

App. 298 (emphasis added).

Non-whites do not enjoy excessive political power under the 1974 lines. Non-whites are 35.1% of the population, but under the 1974 plan they constitute a majority in only 31.4% of the Assembly districts and 30.0% of the Senate districts. Only 22.8% of the present Assemblymen and 20% of the Senators are non-white. See p. 26, *supra*. Non-whites in Brooklyn enjoy, in relation to their proportion of the population, considerably less power than will non-whites in Richmond under the plan approved last Term by this Court in *City of Richmond v. United States*. Far from maximizing non-white voting strength, the 1974 lines fell considerably short of the demands of many non-whites⁶⁴ and had only a minor effect on the outcome of the subsequent election. There is considerable question as to whether the 1974 lines succeeded in overcoming the minimization of minority voting strength that were the fatal defect in the 1972 lines; clearly the 1974 lines did not achieve more than that.

CONCLUSION

The procedures followed by the Attorney General in objecting to the 1972 lines, and the method used by the Legislature in shaping the 1974 lines, were the same as those employed in more than 50 instances in which redistricting plans have been disapproved under section 5. This ap-

⁶⁴ See App. 293-298.

plication of the effect clause to redistricting was sanctioned by this Court in *Georgia v. United States*, and was well known to Congress when it reenacted the Voting Rights Act in 1975. In the face of that renewal, grounded upon a congressional preoccupation with redistricting and an awareness of the particular facts of this case, there is nothing in this case that would justify overturning the established construction and mode of application of the Act. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Association v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 75-104

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH,
INC., ET AL., PETITIONERS

v.

HUGH L. CAREY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH,
INC., ET AL., PETITIONERS

v.

HUGH L. CAREY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-50a) is reported at 510 F. 2d 512. The opinion of the district court (Pet. App. 53a-58a) is reported at 377 F. Supp. 1164.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5a-6a) was entered on January 6, 1975, and a timely petition for rehearing and suggestion of rehearing *en banc* were denied on February 27, 1975 (Pet. App.

3a-4a). On May 19, 1975, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 27, 1975 (Pet. App. 2a). On June 25, 1975, Mr. Justice Blackmun extended the time within which to file a petition to and including July 18, 1975 (Pet. App. 1a). The petition was filed on July 17, 1975, and was granted on November 11, 1975 (423 U.S. 945). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment and Section 1 of the Fifteenth Amendment to the United States Constitution are set forth in petitioners' brief at pages 3 and 4.

Section 2 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. 1973, provides as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Sections 4 and 5 of the Voting Rights Act of 1965, 79 Stat. 438 and 439, as amended, 42 U.S.C. 1973b and 1973c, respectively, are set forth in the opinion of the court of appeals at notes 3 and 4 (Pet. App. 11a-13a).

QUESTIONS PRESENTED

1. Whether the courts below properly dismissed the Attorney General of the United States as a party to this action.

2. Whether the courts below correctly held that the redistricting plan for the state legislature enacted by the State of New York in 1974 does not unconstitutionally dilute petitioners' voting strength.

STATEMENT

Petitioners seek in this section to have declared unlawful a state legislative redistricting plan enacted by the State of New York in 1974 for Kings County and to have implementation of the plan enjoined. They also seek a declaration that the Attorney General of the United States employed improper criteria in objecting to a redistricting plan that had been enacted by the State in 1972 and an injunction prohibiting the implementation of any redistricting plan for Kings County other than that enacted in 1972 or a revised or newly-developed plan that would place the community they purport to represent in a single state senate and assembly district (see Pet. Br. 57).

The involvement of the Attorney General of the United States in the redistricting of Kings County resulted from the Attorney General's determination (see 35 Fed. Reg. 12354 (July 31, 1970)) that the State of New York maintained on November 1, 1968, a test or device (a literacy test) within the meaning of Section 4(c) of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. 1973b(c), and the determination of the Bureau of the Census (see 36 Fed. Reg. 5809 (March 26, 1971)) that less than fifty percent of the voting-age residents of the New York counties of Kings, Bronx and New York voted

in the presidential election of 1968.¹ The effect of these determinations was to prohibit the State of New York from implementing any change in "voting quali-

¹ Prior to the passage in 1970 of amendments to the Voting Rights Act of 1965, the Act applied only to States and political subdivisions which maintained, as of November 1, 1964, tests or devices as prerequisites to voting or voter registration and in which less than fifty percent of the voting-age residents had registered to vote or voted in the presidential election of 1964. 79 Stat. 438, 439. During the deliberations that preceded renewal of the Act in 1970, Congress was made aware that, in a number of jurisdictions not previously covered, the rate of voter registration and voting had declined from the levels existing in 1965 and that in several jurisdictions—including the New York counties of Kings, Bronx and New York—voter registration and the voting rate among voting-age residents had fallen below fifty percent. *E.g.*, 116 Cong. Rec. 6654, 6659 (1970) (remarks of Senator Cooper). A number of explanations were offered for this phenomenon, including the suggestion that New York's literacy test, coupled with the residual effect on potential black voters of their having received inferior educations in segregated schools in both the North and the South, deterred voting-age blacks in New York City from seeking to register and vote. *E.g.*, 116 Cong. Rec. 5563, 6152, 6659, 20161, 20165 (1970) (remarks of Senators Hruska, Eastland and Cooper and of Congressmen Celler and Albert, respectively). These considerations led Congress to alter the formula contained in Section 4 of the Act in a manner that included within the Act's coverage jurisdictions in which participation in the 1968 presidential election had been below fifty percent and a test or device had been employed at some time within the preceding ten years as a prerequisite to voting or voter registration. 84 Stat. 315; see 42 U.S.C. 1973b (a) and (b). The pertinent legislative history reveals that the New York counties of Kings, Bronx and New York "were a definite target of the 1970 amendments" to the Voting Rights Act. *NAACP v. New York*, 413 U.S. 345, 357.

On August 6, 1975, Congress again amended the Voting Rights Act, extending it for an additional seven years and adding new provisions designed primarily to protect the voting rights of citizens whose native language is other than English. 89 Stat. 400; see 42 U.S.C. 1973b(e).

fication or prerequisite to voting, or standard, practice, or procedure" (42 U.S.C. 1973) with respect to voting in the designated counties unless the change had first received the clearance required by the Act.²

The legislature of the State of New York is required by the New York Constitution, Article III,

² The State of New York filed suit for a declaratory judgment on behalf of the affected counties on December 3, 1971, asserting that during the ten years preceding the filing of the suit the applicable voter qualifications had not denied or abridged the voting rights of any individual on account of race or color and seeking an exemption from coverage under the Act. See Section 4(a), 42 U.S.C. 1973b(a). On April 13, 1972, the District Court for the District of Columbia entered the requested declaratory judgment, with the acquiescence of the United States, thereby permitting the State of New York to implement changes in voting procedures in the three counties without complying with the preclearance provisions of the Act. *New York State v. United States*, Civil No. 2419-71; see also *NAACP v. New York*, *supra*, 413 U.S. at 349.

As a result of the decision of the district court in *Torres v. Sachs*, 381 F. Supp. 309 (S.D. N.Y.), which held that the conduct of elections in the City of New York solely in the English language violated the rights of non-English speaking Puerto Rican citizens, the United States moved to reopen the declaratory judgment of April 13, 1972. See 42 U.S.C. 1973b(a). On November 5, 1973, the motion to reopen was granted and the NAACP was granted leave to intervene. The district court rescinded its earlier declaratory judgment on January 4, 1974, and directed the State of New York to comply *pendente lite* with Sections 4 and 5 of the Voting Rights Act. On April 25, 1974, the NAACP moved for summary judgment denying New York's request for an exemption from the Act—contending, *inter alia*, that the New York City system of public education discriminated against blacks and had caused blacks to suffer from a disproportionately high illiteracy rate. On April 30, 1974, the district court denied the motion for summary judgment that had been filed by the State of New York and granted the NAACP's motion for summary judgment. This Court summarily affirmed. *New York on behalf of New York County v. United States*, 419 U.S. 888.

Sections 4 and 5, to reapportion electoral districts throughout the State in accordance with population shifts revealed by the decennial census of the United States.³ Following the 1970 census, the New York legislature enacted reapportionment plans affecting various counties in the State, including Kings, Bronx and New York counties. Laws of New York, chs. 11, 76-78 (1972). Rather than bringing an action for a declaratory judgment, the State of New York, on January 31, 1974, submitted the reapportionment plans involving Kings, Bronx and New York counties to the Attorney General for review under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c (Pet. App. 14a).⁴ This submission entailed proposed redistricting for 14 congressional, 21 state senate and 47 state assembly seats in the three counties.⁵

The Attorney General objected to certain provisions in the reapportionment plans for Kings and New York counties by letter from Assistant Attorney Gen-

³ See *WMCA, Inc. v. Lomenzo*, 377 U.S. 633; *In re Orans*, 17 N.Y. 107, 216 N.E. 2d 311, 269 N.Y.S. 2d 97.

⁴ The delay in presentation of the plan to the Attorney General was occasioned by the litigation discussed at note 2, *supra*.

⁵ Upon receiving a submission under Section 5 of the Act, the Attorney General notifies interested persons and groups of the submission (see 28 C.F.R. 51.13) and conducts an informal review (see C.F.R. 51.1 *et seq.*). That review may take into account materials presented by the State or political subdivision potentially affected by the proposed voting change, information provided by private individuals and groups, and the results of any investigations undertaken by the Department of Justice. The standards the Attorney General uses in deciding whether to object to implementation of a proposed voting change submitted to him for review are set forth at 28 C.F.R. 51.19.

eral Pottinger, dated April 1, 1974 (App. 14-16).⁶ The letter of objection advised the New York Attorney General's office that (App. 14):

on the basis of all available demographic facts and comments received on these submissions as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color, we have concluded that the proscribed effect may exist in parts of the plans in Kings and New York counties.

The Attorney General's objections to the plan for Kings County—which is the only county involved in this litigation—encompassed proposed congressional as well as state senate and assembly districts.⁷ All of these districts would have covered essentially the same geographic area, an area that includes a large community of blacks and Puerto Ricans living in the Bedford-Stuyvesant section of north-central Brooklyn (see App. 221). The factual basis of the Attorney General's objections to the state legislative districts proposed in the plan was explained in the letter as follows (App. 15):

Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the

⁶ See 28 C.F.R. 0.50 and 51.2(d).

⁷ The Attorney General did not object to the provisions in the plan for New York County relating to congressional districts or to any of the provisions in the plan for Bronx County (see App. 14-16).

minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. * * * [W]e know of no necessity for such configuration and believe other rational alternatives exist.⁸

Although the present record contains only part of the materials submitted to and considered by the Attorney General in his review of the 1972 plans, the record does show that the state legislative district lines proposed in those plans were strenuously opposed by persons and groups with ties to the minority communities in Kings County. A lengthy memorandum (App. 202-230) and letter (App. 231-234) submitted on behalf of the NAACP and letters from several prominent black and Puerto Rican elected officials (App. 237-247) charged that electoral lines in New York City generally, and in Kings County in particular, had been purposely and effectively gerrymandered to submerge and dissipate the voting strength of large portions of the black and Puerto Rican populations (*e.g.*, App. 220-221, 237).⁹ In support of these charges, it was alleged, *inter alia*, that (1) the

⁸ Petitioners do not seek in this litigation any relief with respect to the Kings County congressional districting.

⁹ Although not contained in the present record, the Attorney General also received materials contending that the district lines proposed in the 1972 plans were racially neutral. These included legislative committee reports, a memorandum from the New York Attorney General's office replying to the NAACP's memorandum and letters from several state legislators.

district lines of Kings County had been drawn by local political leaders in a conscious effort to preserve in office white legislators from areas with growing black and Puerto Rican populations and to remove white communities from other districts likely to be controlled by those minorities (App. 209-210);¹⁰ (2) racially polarized voting, particularly the strong tendency of white persons to vote against black or Puerto Rican candidates, is an established political fact in New York City (App. 212);¹¹ (3) under the plan the total number of non-whites (*i.e.*, blacks and Puerto Ricans) placed in

¹⁰ For example, the NAACP alleged that an Hasidic Jewish community in the Crown Heights area of Brooklyn had originally been placed in a state assembly district (the 41st Assembly District) having a high percentage of minority persons but that, after vigorous protest, a corridor had been created through the black and Puerto Rican communities in order to reach the Hasidic Jewish community and to place it in a state assembly district comprised predominantly of white persons (App. 210). Similarly, the NAACP alleged that a black and Puerto Rican majority had initially been created in the 44th Assembly District in Brooklyn but that this decision had been reversed as a result of pressure from a white community that would have been in the new district (*ibid.*).

¹¹ The NAACP noted in support of this allegation that no black or Puerto Rican had ever been elected to a statewide office in New York or to a citywide office in New York City and that with a single exception, occurring when a black candidate ran unopposed, no majority white district in the City had ever elected a black or Puerto Rican to office (App. 212-217). It stated that in a 1972 contest between a white candidate and a black candidate in the 57th Assembly District (which contained the Williamsburgh Hasidic Jewish community) "[t]he Black challenger won 27 of the 43 election districts [*sic*: precincts], but lost the election because he was beaten by a margin of almost 10 to 1 in the white community" (App. 212).

majority white districts would exceed the number of whites placed in majority non-white district in Kings County by between 3 and 5 to 1 (App. 220);¹² (4) the 1972 plan for Kings County provided for relatively compact districts in the center of the Bedford-Stuyvesant section of Brooklyn, resulting in districts in which there were virtually no whites (see App. 223-225), and paired the balance of the minority community with larger white communities (App. 221);¹³ and (5) the system of appointing and controlling election inspectors in Kings County had operated in the past to discriminate

¹² The NAACP presented the following table in support of this allegation (App. 220):

Kings County District	Non-Whites in Majority White Districts	Whites in Majority Non-White Districts
Congressional.....	455, 862	93, 547
Senate.....	574, 811	44, 081
Assembly.....	361, 707	135, 260

The 1972 plan for Bronx County, in contrast, placed only a slightly larger number of blacks and Puerto Ricans in predominantly white districts than the number of whites placed in minority districts (App. 220).

¹³ The NAACP observed in support of this allegation that "[a] single overwhelmingly non-white district (the 12th Congressional and 18th Senate), or in the case of the smaller Assembly Districts 5 districts (the 40th, 53rd, 54th, 55th, and 56th), are placed in the center of the [Bedford-Stuyvesant] ghetto [by the 1972 plan for Kings County]. Most of these districts are over 80 percent non-white. The non-white communities remaining further from the center of the ghetto are then paired with larger white communities outside the ghetto. * * * Not a single white community of any size is located in a majority non-white district in Kings County" (App. 221-222).

against and abridge the voting rights of blacks and Puerto Ricans (see App. 225-229).¹⁴

Upon receiving the Attorney General's letter objecting to certain provisions in the redistricting plans for Kings and New York counties, the State of New York could have brought an action before a three-judge court in the District of Columbia challenging the basis of the Attorney General's objections. See 42 U.S.C. 1973c. But the State chose not to do so, purportedly because of "exigencies of time" relating to the preparation and conduct of primary and general elections in 1974 (App. 9).¹⁵ Instead, the State

¹⁴ The NAACP also claimed that various strategies that had been employed in Kings County had "generally succeeded in minimizing the political influence of non-white voters. The first non-white State Senator was not elected in Kings County, for example, until 1964. Prior to 1968 there still was not a majority non-white Congressional District in Kings County, the large Bedford-Stuyvesant ghetto being divided among five majority white districts. As a result of federal litigation the Congressional Districts in Kings County were redrawn in 1968, and a majority non-white district was created. That district, the 12th, has been represented since its creation by Congresswoman Shirley Chisholm" (App. 208-209).

¹⁵ The State was also under pressure because of a suit filed by the NAACP seeking to compel the State to enact new district lines in Kings and New York counties. *NAACP v. New York City Board of Elections*, S.D. N.Y. 72 Civ. 1460 (see Pet. App. 15a and n. 6).

Although the State chose not to file suit in the District Court for the District of Columbia for a declaratory judgment to permit implementation of the 1972 plans, a suit was filed by four state legislators. That suit was ultimately dismissed on the ground that the named plaintiffs lacked standing to challenge the Attorney General's objections to the 1972 plans. *Griffith v. United States*, D.D.C., 74 Civ. 648 (May 3, 1974) (see Pet. App. 55a, n. 15).

revised those portions of the 1972 redistricting plans to which the Attorney General had objected—including the provisions contained in the plan for election to the state senate and assembly from Kings County, which are the subject of this litigation (App. 130–172). The State submitted these revised plans to the Attorney General on May 31, 1974 (App. 284).¹⁶

Shortly after the State had submitted its 1974 redistricting plan for Kings County to the Attorney General, petitioners—who purport (see Pet. Br. 4–6) to represent the Hasidic Jewish community living in the Williamsburgh area of Brooklyn (Kings County)—brought this action challenging the 1974 plan on the ground that it unlawfully diluted the voting strength of the approximately 30,000 persons who comprise the Hasidic Jewish community in Williamsburgh. They alleged, more specifically, that the plan violated their rights under the Fourteenth and Fifteenth Amendments by dividing their community between two state senate and assembly districts.¹⁷ They further alleged that they had been assigned to districts

¹⁶ The racial composition of the state senate and assembly districts provided for in the 1972 and 1974 plans for Kings County is set forth in the appendix to this brief, *infra*, pp. 53–54.

¹⁷ This allegation was based on the fact that the lines between Senate Districts 23 and 25 and between Assembly Districts 57 and 58 would follow the Brooklyn-Queens Expressway under the 1974 plan (App. 10, 29–30) and the pass through their community, whereas under the 1972 plan their community was located entirely within Senate District 17 and Assembly District 57 (App. 7). The community represented by petitioners is within a single congressional district (the 14th Congressional District) under the 1974 plan (App. 47).

solely on the basis of race, in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and that the Attorney General had used improper standards in objecting to certain provisions of the 1972 redistricting plan for Kings County (see App. 5–12).

While petitioners' motion for a preliminary injunction was pending, the Attorney General advised the State, by letter and Memorandum of Decision dated July 1, 1974, that he had decided not to object to implementation of the 1974 redistricting plans for Kings and New York counties (App. 283–302). The Memorandum of Decision noted, *inter alia*, that (1) the Attorney General does “not have standing to evaluate [in the context of reviewing a submission under Section 5 of the Voting Rights Act], and express[es] no opinion as to legal issues not within the scope of the Voting Rights Act” (App. 285); (2) “Puerto Ricans in New York City may be considered within the protections of the Fifteenth Amendment and the Voting Rights Act by virtue of both judicial precedent and Congressional determinations” (App. 291); (3) nothing in the “circumstances surrounding the adoption of the Fifteenth Amendment, the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political subdivisions under the Act” indicates that Congress meant to extend the protections provided for by that Act to Hasidic Jews or to persons of Irish, Polish or Italian descent (App. 293); (4) the purpose of

the Voting Rights Act is to "assure that the *opportunity* of the affected minorities to participate freely in the electoral process" is not abridged, not to maximize the voting strength of affected minorities (App. 298, original emphasis); (5) in light of these governing principles, the materials submitted regarding the 1974 redistricting for Kings and New York counties do not provide a reasonable basis for an objection by the Attorney General to implementation of those plans (App. 302).¹⁸

Following the receipt of notice that the Attorney General had decided not to object to implementation of the 1974 plans, the State of New York (App. 303-306) and the NAACP (App. 201) moved to have petitioner's complaint dismissed on the ground that it

¹⁸ The Attorney General thus rejected the contentions of representatives of the black and Puerto Rican communities that the 1974 plan for Kings County violated the Voting Rights Act because district lines could have been drawn resulting in a greater number of districts with substantial black or Puerto Rican majorities (App. 293-298). The Attorney General's Memorandum of Decision responded in part to minority-group complaints concerning the 1974 plan by noting that (App. 298): "The only function of the Attorney General under Section 5 is to evaluate a voting change, such as that encompassed in the instant submission, once it has been adopted by the state and submitted for the Attorney General's review, and to determine the limited question of whether the purpose or effect of the change in question is to deny or abridge the right to vote on account of race or color. If no such abridgment or denial exists, the Attorney General must not object to the plan, regardless of the merits or demerits of the plan in other regards, including state, local, and partisan political ones. If an abridgment or denial does exist—as we found in the first submission by New York—the Attorney General must object, stating his reasons, but not drawing a counter plan or commanding any particular state response." See, also n. 37, *infra*.

failed to state a claim upon which relief could be granted. The Attorney General moved to be dismissed as a party defendant on the ground, *inter alia*, that the court lacked jurisdiction to adjudicate the allegations against him since any relief could be granted, if at all, solely by the District Court for the District of Columbia under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c (App. 257-258). On July 25, 1974, the district court entered an order denying petitioners' motions for a preliminary injunction and summary judgment and granting the motions to dismiss the action (App. 321-324, Pet. App. 532-538). The court held that once the Attorney General had informed the State of New York that he had decided not to object to implementation of the 1974 redistricting provisions challenged by petitioners, no controversy remained under Section 5 of the Voting Rights Act and that petitioners' constitutional challenges were without merit. With respect to the latter, the court held that petitioners enjoyed no constitutional right to separate community recognition in the reapportionment process, that state officials may take into account the racial impact of alternative redistricting schemes in an effort to correct past racial discrimination and that "no one is being disenfranchised by the redistricting [at issue here] and no voting right is being extinguished" (Pet. App. 58a).

The court of appeals affirmed (by a vote of 2 to 1) on January 6, 1975 (Pet. App. 7a-22a). The court held that the complaint against the Attorney General must be dismissed because the district court was with-

out jurisdiction to review the Attorney General's objections to the 1972 plans and no relief was sought against the Attorney General except a declaration that he had applied impermissible standards in objecting to those plans (Pet. App. 20a-22a). As to the state defendants, the court held that petitioners had failed to prove that their constitutional rights had been violated (*id.* at 26a-32a). In reaching that decision, the court stated that although petitioners presented no cognizable claim, as Hasidic Jews, to remain together as a voting bloc, they did have standing to contend, as white voters, that their voting rights had been abridged on account of race (*id.* at 22a-26a). The court concluded, however, that (1) since the Voting Rights Act "necessarily deals with race or color, corrective action under it must do the same" (*id.* at 31a, emphasis deleted), (2) the Act was intended to implement the Fourteenth and Fifteenth Amendments and is constitutional (*ibid.*), and (3) petitioners had failed to show that the 1974 redistricting improperly diluted the voting strength of white voters in Kings County (*id.* at 31a-32a).

The dissenting member of the panel would have held the redistricting provisions challenged by petitioners unconstitutional on the ground that they were developed with consciousness of racial considerations, and incorporated racial "quotas," which may be tolerated only on rare occasions (Pet. App. 38a-39a), if at all (*id.* at 43a). In the view of the dissent, the use of racial classifications was not shown to be necessary or appropriate to cure any supposed wrongs suffered

by non-whites in Kings County (see *id.* at 42a). The dissenting judge disagreed, moreover, with the majority's consideration of racial percentages in determining whether petitioners' voting rights had been abridged or diluted since "our Constitution forbids us to reason from notions about what kind of racial composition is 'proportionate' or 'disproportionate' in our legislatures" (*id.* at 47a).

SUMMARY OF ARGUMENT

The only relief that petitioners have requested against the Attorney General of the United States is a declaratory judgment that the criteria employed by him in objecting to the 1972 redistricting plan for Kings County were "unconstitutional and improper" (App. 13). But as petitioners apparently now concede, and as the court of appeals held, jurisdiction to entertain such a claim is limited to the District Court for the District of Columbia. It follows that the Attorney General was properly dismissed as a party to this suit.

In addition, petitioners lacked standing to seek review of the Attorney General's objections to the 1972 plan for Kings County—or of the Attorney General's decision not to object of the 1974 plan. Once the Attorney General has objected to the implementation of a proposed voting change submitted to him by a jurisdiction covered by the Voting Rights Act, the voting change may be implemented only if the affected State or political subdivision obtains a declaratory judgment in the District Court for the District of Columbia that the proposed change does not have

the purpose and would not have the effect proscribed by the Act. Once the Attorney General has decided not to object to a proposed voting change, it is similarly settled that private parties, such as petitioners, may seek to enjoin enforcement of the change only in traditional suits attacking its constitutionality. In both types of suit, judicial review focuses on the purpose and effect of the voting change itself rather than on the decision of the Attorney General.

Although the Attorney General was properly dismissed as a party to this suit, the United States nevertheless has a substantial interest in the constitutional questions petitioners have raised. Indeed, we believe that acceptance of the contentions petitioners have advanced would make administration of the Voting Rights Act exceedingly difficult and would significantly undermine the ability of jurisdictions subject to the Act to avoid or remedy district lines having a racially discriminatory effect.

The essence of petitioners' challenge to the 1974 redistricting plan for Kings County is that it was developed with consciousness of its racial impact and that such deliberate use of race is unlawful *per se* under the Fourteenth and Fifteenth Amendments. But it is inconceivable that those responsible for redistricting Kings County could have remained unaware of the approximate racial, ethnic, and political composition of the alternative redistricting plans that were or might have been enacted for Kings County. Once enacted with such awareness, any plan thus would have had a racial purpose in the sense complained of by petitioners—but it does not follow that that pur-

pose would have been invidious or racially discriminatory, in violation of the Fourteenth or Fifteenth Amendments.

Moreover, petitioners fail to recognize that the State of New York was required by the Voting Rights Act to prove the absence of a racially discriminatory effect prior to implementing any changes in existing district lines. It would be anomalous indeed if the good faith (and ultimately successful) efforts of the State of New York to comply with the Voting Rights Act, by avoiding the enactment of a redistricting plan having a racially discriminatory effect, were held unconstitutional because those efforts involved a consciousness of racial impact.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DISMISSED THE ATTORNEY GENERAL OF THE UNITED STATES AS A PARTY TO THIS SUIT

A. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE ATTORNEY GENERAL'S OBJECTIONS TO THE 1972 PLAN FOR KINGS COUNTY OR THE ATTORNEY GENERAL'S DECISION NOT TO OBJECT TO THE 1974 PLAN

The only relief that petitioners have requested against the Attorney General of the United States is a declaratory judgment that the criteria employed by him in objecting to the 1972 redistricting plan for Kings County were "unconstitutional and improper" (App. 13). As the court of appeals held (Pet. App. 21a-22a), however, the District Court for the Eastern District of New York lacked jurisdiction to grant such relief—a fact that petitioners apparently now

concede (see Pet. 9, n. 3; Pet. Br. 51). It follows that the Attorney General was properly dismissed as a party to this suit.

Section 14(b) of the Voting Rights Act, 42 U.S.C. 1973f(b), provides in pertinent part that "[n]o court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue any declaratory judgment" pursuant to Section 5 of this Act. At least three discrete types of suit present questions under Section 5: (1) those initiated by a State or political subdivision to secure a declaratory judgment that a proposed voting change concededly covered by the Act does not have the purpose and would not have the effect, if implemented, of denying or abridging the right to vote on account of race or color; (2) those initiated by a private party to secure declaratory and injunctive relief, and involving the claim that a particular state enactment is covered by Section 5 but has not been subjected to the required federal scrutiny; and (3) those initiated by the Attorney General of the United States to secure an injunction prohibiting the implementation of a state enactment without the required federal preclearance.

Although all three of these types of suit involve questions arising under Section 5, and must be heard by a three-judge district court,¹⁹ jurisdiction to entertain only the first—a suit by a State or political subdivision for a declaratory judgment permitting the

¹⁹ *Perkins v. Matthews*, 400 U.S. 379, 383–387; *Allen v. State Board of Elections*, 393 U.S. 544, 560–563; cf. *Harper v. Levi*, 520 F. 2d 53, 61–64 (C.A.D.C.).

implementation of a voting change covered by the Act—is limited to the District Court for the District of Columbia.²⁰ As this Court explained in *Allen v. State Board of Elections*, *supra*, 393 U.S. at 558–559 (emphasis omitted):

A declaratory judgment brought by the State pursuant to [Section] 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a private litigant does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. The difference in the magnitude of these two issues suggests that Congress did not intend that both can be decided only by the District of Columbia District Court. Indeed, the specific grant of jurisdiction to the district courts in [Section] 12(f) indicates Congress intended to treat "coverage" questions differently from "substantive discrimination" questions.* * *²¹

²⁰ This jurisdictional limitation has been upheld by this Court as a proper exercise of Congress' power under Article III, Section 1, of the Constitution to "ordain and establish" inferior federal tribunals. *South Carolina v. Katzenbach*, 383 U.S. 301, 335; *Allen v. State Board of Elections*, *supra*, 393 U.S. at 559–560.

²¹ Section 12(f) of the Act, 42 U.S.C. 1973j(f), provides that "[t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law."

This Court again dealt with the differences between the "coverage" and "substantive discrimination" questions arising under Section 5 of the Voting Rights Act in *Perkins v. Matthews, supra*. The decision in that case again confirmed that all judicial power to review proposed voting changes affecting jurisdictions subject to the Act, and to render declaratory judgments permitting the implementation of such changes, is vested exclusively in the District Court for the District of Columbia (400 U.S. at 384-385):

* * * *Allen* * * * explicitly held that, as between the United States District Court for the District of Columbia and other district courts "Congress intended to treat 'coverage' questions [*i.e.*, whether a particular voting change requires federal preclearance] differently from 'substantive discrimination' questions," * * * and therefore: "we do not consider whether this change has a discriminatory purpose or effect." * * * This is not to say that a district court limited to deciding a "coverage" question should close its eyes to the congressional purpose in enacting [Section] 5 * * * What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does not have the purpose or effect "of denying or abridging the right to vote on account of race or color."²²

²² This Court held in *Perkins* that a three-judge district court sitting in Mississippi had misconceived the permissible scope of its inquiry under Section 5 of the Voting Rights Act in examining several changes in voting procedures to determine whether

Thus, had the State of New York sought a declaratory judgment permitting implementation of the 1972 redistricting plan for Kings County, it is settled that only a three-judge district court in the District of Columbia would have had jurisdiction to entertain the suit. The fact that the State chose instead to submit the 1972 plan for Kings County to the Attorney General neither precluded it from subsequently seeking a declaratory judgment permitting implementation of the plan (see, *e.g.*, *Beer v. United States*, No. 73-1869, decided March 30, 1976) nor conferred upon the single-judge district court in this case jurisdiction over petitioners' complaint against the Attorney General. Similarly, the fact that petitioners did not directly seek in this suit a declaratory judgment permitting implementation of the 1972 plan did not cure the jurisdictional defect in their complaint against the Attorney General: at base, their request for a declaratory judgment that the Attorney General had used "unconstitutional and improper criteria" in objecting to the 1972 plan amounted to a request that the district court adjudicate a "substantive discrimination" question arising under Section 5 of the Voting Rights Act. This request was inconsistent with the Act's explicit vesting of all judicial power to consider such questions in the District Court for the

they had a racially discriminatory purpose or effect. 400 U.S. at 383-386; see also *Connor v. Waller*, 421 U.S. 656 (*per curiam*); *City of Richmond v. United States*, 422 U.S. 358, 381 (Brennan, J., dissenting); *Holt v. City of Richmond*, 459 F. 2d 1093, 1100 (C.A. 4), certiorari denied, 408 U.S. 931.

District of Columbia, and misconceived the role of the Attorney General under Section 5.²³

If a State or political subdivision covered by the Voting Rights Act chooses to submit a proposed voting change to the Attorney General, as did the State of New York in the present case, the Attorney General must determine within sixty days whether the submitting authority has satisfied its burden of showing that the change is without a racially-discriminatory purpose or effect, 42 U.S.C. 1973c; 28 C.F.R. 51.19.²⁴ In

²³ The State of New York has requested that, in the event the 1974 redistricting plan for Kings County is held to violate certain of petitioners' constitutional rights, this Court "should direct the District Court to order the use of the district lines established by [the 1972 plan for Kings County]" (Br. 27). For the reasons just discussed, however, the 1972 redistricting plan for Kings County is not before this Court, the State of New York having chosen not to seek clearance for the plan in the District Court for the District of Columbia after having been notified of the Attorney General's objections. Even if this Court were to hold portions of the 1974 plan unconstitutional, the fact would remain that the State has thus far failed to meet its burden—in the only forums permitted by statute to consider the question—of showing that the 1972 plan would not have, if implemented, the racially-discriminatory purpose or effect proscribed by the Voting Rights Act.

²⁴ 28 C.F.R. 51.19 provides in part that "[i]f the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the * * * burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

In *South Carolina v. Katzenbach*, *supra*, 383 U.S. at 335, this Court stated that "there was nothing inappropriate about limiting litigation under [Section 5 of the Act] to the District Court for the District of Columbia, and in putting the burden of proof on the areas seeking relief." One of the principal purposes of

the event that burden is not satisfied, the Attorney General must interpose an objection—but the submitting authority nevertheless may seek from the District Court for the District of Columbia a declaratory judgment permitting implementation of the proposed voting change. If the submitting authority meets its burden of showing that the proposed change has neither the purpose nor the effect proscribed by the Act, the Attorney General may not object and the change may be implemented forthwith. Once the submitting authority has received the required federal clearance under Section 5, "private parties may enjoin enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by [Section] 5" (*Allen v. State Board of Elections*, *supra*, 393 U.S. at 549-550).

The legislative history of the Voting Rights Act clearly indicates that by conferring jurisdiction to consider substantive discrimination questions arising under Section 5 upon only a single federal district court, Congress sought to ensure that covered voting changes would be dealt with on the federal level pur-

28 C.F.R. 51.19 is to place the same burden upon submitting authorities that choose to have proposed voting changes reviewed by the Attorney General that they would have in a suit for a declaratory judgment in the United States District Court for the District of Columbia. This Court approved the burden of proof provision of 28 C.F.R. 51.19 in *Georgia v. United States*, 411 U.S. 526, 538-539. See also H.R. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 8 (1975).

suant to uniform and consistent standards.²⁵ The Attorney General has acted consistently with this goal by reviewing proposed voting changes submitted to him in accordance with the criteria that govern the adjudication of requests for a declaratory judgment in the District Court for the District of Columbia (and in accordance with the decisions of this Court). To permit these questions to be decided by district courts other than the District Court for the District of Columbia would jeopardize the uniformity and consistency that Congress sought to build into the preclearance mechanisms created by Section 5.

Moreover, in reviewing proposed voting changes submitted to him under Section 5, the Attorney General "does not act as a court" (*Allen v. State Board of Elections*, *supra*, 393 U.S. at 549), but simply affords covered jurisdictions an expeditious means of securing the required federal preclearance.²⁶ If the Attorney

²⁵ *E.g.*, 111 Cong. Rec. 8839, 10355, 15663 (1965): Hearings on S. 1564 (Voting Rights) before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, pp. 69-73 (1965). An amendment to vest jurisdiction in all federal district courts to entertain suits for declaratory judgments, permitting the implementation of covered voting changes, was defeated in 1965 (111 Cong. Rec. 10371 (1965)), and again in 1975 (121 Cong. Rec. H 4899 (daily ed. June 4, 1975)).

²⁶ As originally introduced, the bill that ultimately became the Voting Rights Act of 1965 made the enforceability of covered voting changes entirely contingent upon their preclearance by the District Court for the District of Columbia (the original bill (S. 1564, 89th Cong., 1st Sess. (1965)) is reproduced at 111 Cong. Rec. 5403-5404 (1965)). During the hearings on the bill before the Senate Judiciary Committee, Attorney General Katzenbach suggested that the burdens inherent in this procedure could be lessened significantly, without undue cost, were the bill amended to permit such changes to be submitted for less formal review and

General interposes a timely objection to a proposed voting change, and the submitting authority subsequently seeks a declaratory judgment to permit implementation of the change, the submitting authority is entitled in that judicial proceeding to a trial *de novo*. No particular weight is attached at that stage to the Attorney General's prior adverse determination, and the suit proceeds as one against the United States rather than against the Attorney General. The Attorney General is not called upon in such a suit to justify the basis of his earlier objections;²⁷ rather, the burden remains upon the State or political subdivision bringing the suit to show that the proposed vot-

possible preclearance by the Attorney General. Hearings on S. 1564 (Voting Rights) before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 237 (1965).

²⁷ Indeed, it would be contrary to the Act's scheme to permit judicial review of the Attorney General's determination to interpose an objection as an alternative to the declaratory judgment suit authorized by the Act. Such review would be both factually confined (to the materials that were submitted to the Attorney General) and legally far less than a decision on the ultimate merits, since the question necessarily would be whether the Attorney General had a reasonably arguable (even if ultimately incorrect) legal basis, under the decision law at the time, for interposing the objection. In light of the importance of expeditious resolution of voting rights cases and the availability under the Act of the dispositive declaratory judgment remedy, there is no proper role for such oblique and backward-looking litigation. It would, for example, serve no useful purpose for a court now to consider whether in a particular instance, prior to this Court's reversal of it, the Attorney General reasonably interpreted and applied the standards of the district court's decision in *Beer*. Instead, as in *Beer* itself, the specifically authorized declaratory judgment remedy provides the proper means for developing the legal standards to be applied under Section 5 by both the courts and the Attorney General.

ing change does not have the purpose and will not have the effect, if implemented, of denying or abridging the right to vote on account of race or color. See, e.g., *Beer v. United States*, No. 73-1869, decided March 30, 1976.

For similar reasons, had petitioners or the State of New York sought in the present case a declaratory judgment that the Attorney General used improper criteria in not objecting to implementation of the 1974 redistricting plan for Kings County—relief they have not requested—the district court would have lacked jurisdiction to entertain that claim. The significance of the Attorney General's decision not to object to the 1974 plan, so far as the present suit is concerned, is that it permitted the immediate implementation of the plan and meant that further consideration of petitioners' asserted grievances could proceed only on constitutional grounds (cf. *Connor v. Waller, supra*). If petitioners had prevailed on their Fourteenth and Fifteenth Amendment challenges to the 1974 plan, the Attorney General's decision not to object would have been without practical significance since the district court presumably would have enjoined the enforcement of the provisions of the plan that it found unconstitutional. But having found petitioners' challenges to be without merit, as it did, the court hardly would have been in a position to direct the Attorney General to enter an objection.²⁸

²⁸ The decision in *Harper v. Levi*, 520 F. 2d 53 (C.A.D.C.), is not to the contrary. The plaintiffs in that case challenged a decision by the Attorney General not to object to the implementation of a proposed voting change, concededly covered by the Voting

B. PETITIONERS LACKED STANDING TO SEEK REVIEW OF THE ATTORNEY GENERAL'S OBJECTIONS TO THE 1972 PLAN FOR KINGS COUNTY OR THE ATTORNEY GENERAL'S DECISION NOT TO OBJECT TO THE 1974 PLAN

Section 5 of the Voting Rights Act provides that only a "State or subdivision may institute an action in the United States District Court for the District

Rights Act, which had been held to be constitutional by a three-judge district court in South Carolina. The notice of the Attorney General's decision not to object to the change explained that "[i]t would in our view not be appropriate * * * to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction" (*id.* at 59). The court of appeals held (by a 2-1 vote) that a single-judge district court in the District of Columbia had had jurisdiction to review the Attorney General's decision not to object to the voting change and, on the merits, that Section 5 of the Voting Rights Act requires the Attorney General to exercise his independent judgment in deciding whether a particular voting change has the purpose or would have the effect proscribed by the Act.

But the court of appeals took great care in *Harper* to distinguish the question presented in that case from the situation here. The court stated in *Harper*, for example, that "[w]e express no opinion on [the] reviewability of a determination not to object allegedly involving an erroneous application of [Section] 5's purpose-effect standard" (*id.* at 67, n. 115). The court added that "orthodox judicial review of a decision to interpose an objection presents different questions" than are presented when the Attorney General has simply deferred to a prior judicial determination unrelated to the Voting Rights Act and that "[i]t may be that Congress intended to confine review of * * * a decision [made by the Attorney General under Section 5] to the declaratory judgment action specified in [Section] 5 [citing *Allen v. State Board of Elections, supra*, and the court of appeals' decision in the present case]" (*ibid.*).

The court of appeals also stated in *Harper* that "undeviating deference by the Attorney General [to a decision by a district court outside the District of Columbia] conflicts directly with the

of Columbia for a declaratory judgment" that a proposed voting change does not have the purpose and would not have the effect proscribed by the Act.²⁹ Thus, even if petitioners had brought the present suit in the District Court for the District of Columbia, and had requested the convening of a three-judge court, they would have lacked standing under the Act to request that the court enter a declaratory judgment that the Attorney General had used improper criteria in objecting to certain provisions of the 1972 redistricting plan for Kings County.³⁰ Petitioners also

congressional objective in vesting exclusive jurisdiction of actions under Section 5 in the District Court for the District of Columbia. Congress intended that the Section 5 standard be applied uniformly to covered states, and to accomplish this end directed that all litigation under Section 5 take place in the District of Columbia. To the extent that the Attorney General accords conclusive weight to local court determinations, the congressional goal of decisional uniformity may be frustrated" (*id.* at 72, footnotes omitted), Petitioners' request that the District Court for the Eastern District of New York issue a declaratory judgment that the Attorney General applied improper criteria in objecting to the 1972 redistricting plan for Kings County would similarly contravene this congressional policy. But see *East Carroll Parish School Board v. Marshall*, No. 73-861, decided March 8, 1976, slip. op. 3-4, n. 6. A later stage of the *Harper* litigation is currently pending on appeal in this Court in *Morris v. Gressette*, No. 75-1583.

²⁹ A related provision of the Act specifies that the optional submission of a proposed voting change to the Attorney General must be made "by the chief legal officer or other appropriate official of such State or subdivision * * *." 42 U.S.C. 1973c.

³⁰ As noted earlier (see note 15, *supra*), a suit was filed in the District Court for the District of Columbia challenging the Attorney General's decision to object to portions of the 1972 plans. That suit was ultimately dismissed on the ground that the named plaintiffs, four state legislators, lacked standing to challenge the Attorney General's decision. *Griffith v. United States*, D.D.C., 74 Civ. No. 648 (May 3, 1974) (see Pet. App. 55a).

would have lacked standing to challenge under the Voting Rights Act the Attorney General's decision not to object to implementation of the 1974 redistricting plan for Kings County since, as already noted, once the Attorney General has decided not to object to a particular voting change "private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by [Section] 5" (*Allen v. State Board of Elections*, *supra*, 393 U.S. at 549-550).³¹

The only consequence of the Attorney General's having objected to a proposed voting change is to return the submitting authority to the *status quo ante*—that is, the submitting authority may not implement the change without having secured a favorable declaratory judgment in the District Court for the District of Columbia; alternatively, the submitting authority may forego changing its election laws or may amend the proposed change and seek federal preclearance of the new proposal. While the submitting authority is thus entitled to seek the required federal preclearance in a judicial proceeding, private parties such as petitioners are in a significantly different position.³²

³¹ It is immaterial whether this conclusion is characterized as a failure to state a claim upon which relief could be granted or as lack of standing.

³² Private parties have standing under the Voting Rights Act to obtain declaratory and injunctive relief prohibiting the enforcement of a particular state enactment pending the required federal preclearance. *Allen v. State Board of Elections*, *supra*, 393 U.S. at 554-557. The standing of private parties to seek such relief is based upon the guaranty in Section 5 that "no person shall

Petitioners had no legal right to implementation of the district lines described in the 1972 plan for Kings County, just as they had no enforceable right to have those lines enacted by the New York Legislature or to obtain the reversal of a veto by New York's Governor, had that occurred. The injury of which petitioners now complain—the division of their community between two state senate and assembly districts—was not caused by the Attorney General's objection to the 1972 plan for Kings County. The State had the option, in the face of that objection, of seeking the required federal clearance of the 1972 plan in the District Court for the District of Columbia or of

be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, Section 5].” As this Court noted in *Allen*, the Attorney General “has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government” (393 U.S. at 556, footnote omitted). It is therefore consistent with the broad remedial purposes of the Act—as urged by the United States in *Allen* (see 393 U.S. at 557, n. 23)—“to allow the individual citizen standing to insure that his city or county government complies with the [Section] 5 approval requirements” (*id.* at 557).

These considerations obviously do not apply when the Attorney General has interposed an objection to implementation of a proposed voting change, concededly covered by the Act. There is no danger in the latter circumstances that a person will be denied the right to vote because of the enforcement of a state enactment covered by, but not approved under, Section 5 of the Act. And, of course, the State or political subdivision affected by the Attorney General's objection to a particular voting change may seek the required clearance in the District Court for the District of Columbia.

adopting whatever different plan New York authorities deemed appropriate.²³

II. THE 1974 PLAN FOR KINGS COUNTY DOES NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FOURTEENTH OR FIFTEENTH AMENDMENTS

Although the Attorney General was not properly joined as a party to this suit, the United States nevertheless has a substantial interest in the constitutional questions that petitioners have raised. In challenging the 1974 redistricting plan for Kings County on constitutional grounds, petitioners are advancing contentions which, if accepted, would go far toward preventing realization of congressional goals reflected in the Voting Rights Act. Successful administration of that Act in the context of redistricting depends to a significant extent upon the ability of the covered States and political subdivisions to take into account the racial composition of proposed electoral districts.

²³ Had the State of New York brought suit under Section 5 of the Voting Rights Act for a declaratory judgment to permit implementation of the 1972 plan for Kings County, petitioners might have been permitted to intervene in that suit. See *City of Richmond v. United States*, 376 F. Supp. 1344, 1349, n. 23 (D. D.C.), vacated and remanded, 422 U.S. 358; *Beer v. United States*, 374 F. Supp. 363, 367, n. 5 (D. D.C.), vacated and remanded on other grounds, No. 73-1869, decided March 30, 1976; *City of Petersburg v. United States*, 354 F. Supp. 1021, 1024 (D. D.C.), affirmed, 410 U.S. 962. That method of permitting the views of interested private parties to be considered in a suit for a declaratory judgment seeking approval of a proposed voting change under Section 5 is not inconsistent with the Act's provision limiting the initiation of such a suit to the affected State or political subdivision. Cf. *Trbovich v. United Mine Workers*, 404 U.S. 528.

Petitioners would have this Court declare such use of race unlawful *per se* under the Fourteenth and Fifteenth Amendments, thereby undermining the ability of jurisdictions subject to the Voting Rights Act to avoid or remedy district lines having a racially discriminatory effect.

As discussed more fully below, the 1974 redistricting plan for Kings County does not violate petitioners' rights under either the Fourteenth or Fifteenth Amendment. Petitioners' complaint, in essence, is that the 1974 plan divided their community between two state senate and assembly districts and that that result was produced by a deliberate and unconstitutional use of race. But, as the court of appeals pointed out (Pet. App. 22a-24a), petitioners do not enjoy—as Hasidic Jews—a constitutional right to separate community recognition in legislative redistricting. Indeed, there cannot be separate representation of every community interest that thrives in Kings County, since the number of well-defined communities in the county far exceeds the number of available state senate and assembly seats.³⁴ Nor could petitioners show that the effect of the 1974 plan is to abridge their right to vote as white voters. In fact, whites are in a majority under the 1974 plan in a higher percentage of state senate and assembly districts than their percentage of the population of the county as a whole (Pet. App. 27a-28a, n. 21).

³⁴ See Pet. App. 23a; *Wells v. Rockefeller*, 281 F. Supp. 821, 825 (S.D.N.Y.), reversed on other grounds, 394 U.S. 542.

Petitioners' contention that electoral redistricting must be accomplished without consciousness of its racial impact is both unrealistic and ultimately inconsistent with the right petitioners seek. Quite apart from the commands of Section 5 of the Voting Rights Act, it is inconceivable that the Joint Legislative Committee responsible for recommending district lines to the New York Legislature, or the Legislature itself, would be unaware of the approximate racial, ethnic, and political composition of the alternative redistricting plans that were or might have been enacted for Kings County. Consequently, any electoral redistricting plan enacted for Kings County would in this sense have a racial purpose—but that purpose would not necessarily be invidious or discriminatory. At base, moreover, petitioners do not really seek enactment of an electoral redistricting plan drawn wholly without regard to such considerations; they seek instead to require the State of New York to return to or develop a plan for Kings County sufficiently conscious of racial or ethnic composition to unite the community they purport to represent in a single state senate and assembly district.

In contending that the state senate and assembly districts provided for in the 1974 plan are invalid because they were developed with a consciousness of racial impact, petitioners also fail to recognize that the State of New York was required by the Voting Rights Act to prove the absence of a racially discriminatory effect prior to implementing any changes

in existing district lines. Thus, the state defendants could not close their eyes to race in developing a redistricting plan for Kings County, even if that were otherwise possible. Such racial consciousness is not equivalent, however, to invidious racial discrimination.

A. THE 1974 PLAN FOR KINGS COUNTY DOES NOT HAVE THE EFFECT OF DENYING OR ABRIDGING PETITIONERS' RIGHT TO VOTE ON ACCOUNT OF RACE

Although petitioners asserted in their complaint that "the result" of the 1974 redistricting plan for Kings County was "unjustifiably to divide in half, for electoral purposes" the Hasidic Jewish community in Williamsburgh, and to "dilute the value of each [petitioner's] franchise by halving its effectiveness" (App. 11), petitioners have not pressed that assertion in this Court. As presently framed by petitioners, this case does not involve an allegation of a racially discriminatory effect but of a racially discriminatory purpose. We submit, however, that the purpose and effect of the redistricting provisions challenged by petitioners cannot be entirely compartmentalized, and that prior to assessing the lawfulness of the purpose of the 1974 plan it is important first to recognize that the plan does not have the effect of denying or abridging the right to vote on account of race.

According to the data submitted to the Attorney General in connection with his review of the 1972 and 1974 plans, whites constitute 64.9 percent and non-whites (*i.e.*, blacks and Puerto Ricans) constitute 35.1

percent of the total population of Kings County.³⁵ Under the 1974 plan, three of the ten state senate districts wholly or partially within the county, or 30 percent, contain substantial non-white population majorities—a percentage somewhat lower than the percentage of non-whites in the population of the county as a whole. Of the twenty-two state assembly districts within Kings County, fifteen (or 68 percent) contain white population majorities. (See Pet. App. 27a–28a, n. 21.)

Moreover, at least two factors cause the voting potential of whites under the 1974 plan to be in fact significantly higher than indicated by the total population figures. First, the percentage of the white population in Kings County of voting age is approximately 20 percent higher than the percentage of blacks and Puerto Ricans of voting age (App. 263). Second, the mobility rate among non-whites in Kings County is significantly greater than the mobility rate among

³⁵ The data provided to the Attorney General by the State of New York referred separately to whites, Negroes, Puerto Ricans and "others" (*i.e.*, primarily Asian-Americans (App. 106)). Consistently with the Attorney General's analyses in reviewing the plans submitted by the State (see App. 294), the minority-group statistics set forth in this brief refer only to blacks and Puerto Ricans. References in the record by state officials to "non-white" or "minority" percentages, however, generally include persons in the "other" category (see App. 106), resulting in slightly higher percentages of minority persons in several districts than the percentages relied upon by the Attorney General. In no electoral district in Kings County do persons in the "other" category account for more than two percent of the total population (App. 252–255).

whites. Because of New York's residency requirements (see *Rosario v. Rockefeller*, 410 U.S. 752, 759, n. 9), a smaller percentage of blacks and Puerto Ricans of voting age are actually eligible to vote in any particular state election than whites of voting age (see App. 264).³⁶ Thus, in order for blacks and Puerto Ricans of voting age to be in the majority in any given electoral district, blacks and Puerto Ricans must comprise substantially more than 50 percent of the district's total population.

Thus, it can hardly be said that the effect of the 1974 redistricting plan for Kings County is to dilute or minimize the voting power of white residents of the county. Not only are whites in a majority in a higher percentage of electoral districts in the county than their percentage of the total population, but they have voting power exceeding that indicated by total population figures. Nor is there any evidence in the present record suggesting that "the political processes leading to nomination and election [in Kings County are] not equally open to participation" by whites (*White v. Regester*, 412 U.S. 755, 766); indeed, the available evidence indicates that those processes are

³⁶ As a result of the elections held under the 1974 plan, 77.2 percent of the assemblymen and 80 percent of the senators from Kings County are white. Of the five districts in which increases in the percentage of blacks and Puerto Ricans occurred as a result of the 1974 plan (when contrasted with the 1972 plan approved by petitioners), white candidates prevailed in all but one district. *The New York Times*, November 7, 1974, pp. 39-40; see *National Roster of Black Elected Officials* (Vol. 5), Joint Center for Political Studies, July 1975, p. 162.

somewhat more accessible to whites, or at least have been more accessible historically, than to non-whites (see discussion at pp. 8-11, *supra*).³⁷

B. THE 1974 PLAN FOR KINGS COUNTY IS NOT UNCONSTITUTIONAL
SIMPLY BECAUSE IT WAS DEVELOPED WITH A CONSCIOUSNESS OF THE
PLAN'S RACIAL IMPACT

Petitioners' basic contention is that overt consciousness of racial impact in the drawing of district lines is unlawful *per se* under the Fifteenth Amendment (see Pet. Br. 24-42). Although this contention has considerable superficial appeal, it ignores the unavoidable realities of legislative redistricting and would make compliance with the Fifteenth Amendment virtually impossible in the context of redistricting. It is

³⁷ The district lines provided for in the 1974 plan for Kings County were vigorously opposed by representatives of the black and Puerto Rican communities on the ground, *inter alia*, that district lines could have been drawn resulting in a greater number of electoral districts with substantial black and Puerto Rican majorities (see App. 293-298). The Attorney General's Memorandum of Decision responded in part to minority-group complaints concerning the 1974 plan by noting that (App. 298): "In addition to the fact that the law does not require the state to 'maximize' minority voting strength through gerrymandering or other artificial devices, the facts in this case—particularly the geographical dispersion of Puerto Rican neighborhoods throughout Kings County—show that it is virtually impossible to draw a majority Puerto Rican congressional district. They show further that even a 30% Puerto Rican district is attainable only by considerable gerrymandering. In this regard, and with respect to complaints of both groups, we repeat the test defined by the courts is not whether districts still more favorable to minorities can be drawn but, rather, whether the districts as drawn have the effect of minimizing minority voting strength."

unrealistic to expect that those responsible for drafting or enacting plans of reapportionment could complete their work without becoming aware of at least the approximate racial and ethnic impact of possible redistricting plans, any more than such persons can realistically be expected to isolate themselves from knowledge of the political impact of their work—which may well tend to coincide with its racial and ethnic impact. As this Court observed in *Gaffney v. Cummings*, 412 U.S. 735, 753, a case involving use of political considerations in the redistricting process:

District lines are rarely neutral phenomena. * * * The reality is that districting has and is intended to have substantial political consequences.

It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

There is, accordingly, no constitutional requirement that redistricting necessarily, or even preferably, be accomplished by political eunuchs (see *Gaffney, supra*, 412 U.S. at 753–754)—even though the Constitution prohibits invidious governmental discrimination on the

basis of political association or belief (*Elrod v. Burns*, No. 74–1520, decided June 28, 1976; *Perry v. Sindermann*, 408 U.S. 593, 597–598).

These principles are no less applicable to consciousness of a redistricting's racial impact than to consciousness of its (sometimes largely coincident) political impact. As Mr. Justice White cogently observed in dissenting (on other grounds) in *Beer v. United States*, No. 73–1869, decided March 30, 1976 (slip op. at 2), “lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district.”

Accordingly, the constitutional claims in the present case are largely answered by the Court's decision in *Gaffney v. Cummings, supra*. There, it was “frankly admitted by those who prepared the [state legislative districting] plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas” (412 U.S. at 752). Similarly, the plan here was designed to achieve a proportion of majority white and of majority non-white districts roughly approximating the proportion of each racial group in the countywide population. The constitutional permissibility of such a choice by a State in apportioning its legislature—at least where, as here, the plan's districts are con-

tiguous and reasonably compact and meet one person-one vote standards (see n. 41, *infra*)³⁸—is, we submit, established by this Court's holding in *Gaffney* (412 U.S. at 754; emphasis added):

* * * [J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties [races] in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reapportionment plans for Connecticut [Kings County] that would have different political [racial] consequences and that would also be constitutional. * * * But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of *any group* or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

It is thus manifest that, wholly apart from any consideration of the role of the Voting Rights Act in the present case, the 1974 plan violates no constitutional right of the petitioners.³⁹ Nor, we submit, can

³⁸ There is no claim that the 1974 plan is deficient in any of these respects, and the record indicates that there would be no basis for such a claim. See App. 102, 115, 173-174, 190-194; cf. App. 197-198.

³⁹ Cf. *Beer v. United States*, *supra*, in which this Court held that, in the absence of a finding of racially discriminatory purpose, a redistricting plan for the New Orleans city council, challenged on the ground that it needlessly divided concentrations of black voters among several majority-white districts, "does not remotely approach a violation of * * * constitutional standards * * *" (slip op., 12, n. 14).

this otherwise constitutionally permissible plan be rendered unconstitutional by the fact that the state authorities who adopted it may have been motivated, in whole or in part, by the applicability of the Voting Rights Act to Kings County. It would be a gross anomaly if the good faith desire of state officials to promote the policies of a federal statute, validly enacted to enforce the Fifteenth Amendment, were held to infect with invidious discrimination an otherwise wholly permissible state redistricting law.⁴⁰ To the contrary, this Court's decisions establish that, within proper limitations, governmental entities may take race into account both to ameliorate the effects of past discrimination and to prevent future discrimination. *E.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18; *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45; *United States v. Montgomery County Board of Education*, 395 U.S. 225; accord, *e.g.*, *Otero v. New York City Housing Authority*, 484 F. 2d 1122 (C.A. 2); *Gautreaux v. Romney*, 448 F. 2d 731 (C.A. 7); *Boston Chapter N.A.A.C.P. v. Beecher*, 504 F. 2d 1017 (C.A. 1); *Morrow v. Crisler*, 491 F. 2d 1053 (C.A. 5), certiorari denied, 419 U.S. 895. The teaching of these and similar cases is that governmental action involving

⁴⁰ Nor does the validity of the state enactment depend on whether all legislators who voted for it correctly conceived the requirements of the federal law or the Constitution. So long as the redistricting plan was, as here, objectively permissible and not adopted for the purpose of discriminating against the petitioners, they have no right to have it set aside. Cf. *City of Richmond v. United States*, 422 U.S. 358; *Washington v. Davis*, No. 74-1492, decided June 7, 1976.

a consciousness of race is not *per se* unlawful under either the Fourteenth or the Fifteenth Amendment. The question is whether invidious use is made of race—that is, in a voting rights case, whether race was used as a basis for denying the right to vote (*eg.*, *Gomillion v. Lightfoot*, 364 U.S. 339), or was employed as part of a “contrivance to segregate” (*Wright v. Rockefeller*, 376 U.S. 52, 58), to minimize or cancel out the voting strength of a minority class or interest (*eg.*, *White v. Regester*, *supra*, 412 U.S. at 765–770; *cf.* *Whitcomb v. Chavis*, 403 U.S. 125, 143–144; *Burns v. Richardson*, 384 U.S. 73, 88; *Fortson v. Dorsey*, 379 U.S. 433, 439), or otherwise to impair or burden the opportunity of affected persons to participate in the political process (*eg.*, *Louisiana v. United States*, 380 U.S. 145, 151–153). Petitioners have made no such showing here.⁴¹

⁴¹ Petitioners attempt to distinguish cases in which this Court and other courts have approved consciousness of race to remedy or avoid governmental actions that are racially discriminatory in effect by arguing that there are “no factual circumstances in the voting area, similar to that in public education or employment, where race-consciousness is necessary ‘to undo the effects of past discrimination’ or prevent its perpetuation. If an apportionment is or has been racially discriminatory, it may and should set aside, and a new apportionment—based on ‘neutral’ criteria—should replace it” (Pet. Br. 21). For the reasons already discussed, however, it is unrealistic to contend that legislative redistricting must be based solely on “neutral” criteria. But it is significant here, we submit, that the state’s use of race-consciousness in adopting the 1974 plan did not prevent it from observing its normal “neutral” criteria for redistricting—contiguous, reasonably compact districts with minimal population variances (see n. 38, *supra*). The use of race-consciousness to override or substantially distort a state’s normal neutral criteria for redistricting would present a different case, which need not be decided here.

Indeed, what petitioners seek, at bottom, in this litigation is not a redistricting plan for Kings County drawn without regard to racial impact, but a plan drawn with sufficient sensitivity to racial and ethnic impact to place the Hasidic Jewish community in Williamsburgh in a single state senate and assembly district. Petitioners quote with approval testimony concerning the conscious efforts of state officials to accomplish again precisely that result, as they had in the past (Pet. Br. 13–14; see also App. 7, 97.) Whether the division of petitioners’ community is characterized as defective because of an asserted entitlement to “separate community recognition in the reapportionment process” (an assertion that petitioners disclaim (see Pet. Reply Br. 2)) or as evidencing a “distinct and legally cognizable injury” (an assertion upon which petitioners rely (see *id.* at 2–3, n. 2)), the fact remains that the relief petitioners seek involves no less consciousness of race than did development of the redistricting provisions challenged in this litigation.

C. PETITIONERS’ CONSTITUTIONAL ARGUMENTS ALSO FAIL TO TAKE INTO ACCOUNT THE FACT THAT IN REDISTRICTING KINGS COUNTY THE STATE WAS REQUIRED TO COMPLY WITH SECTION 5 OF THE VOTING RIGHTS ACT

Petitioners’ constitutional arguments also fail to recognize that those responsible for developing and enacting a reapportionment plan for Kings County could not close their eyes to racial impact and realistically hope at the same time to comply with Section 5 of the Voting Rights Act. As already noted, before implementing any change in existing voting practices

or procedures in the county, the State of New York was required to demonstrate that the change did not have the purpose and would not have the effect of abridging the right to vote on account of race. In determining whether the State had met this burden, the Attorney General was obligated by Section 5 of the Voting Rights Act to assess the impact of the 1974 plan in terms of the relative opportunities afforded minority-group members effectively to participate in the electoral process.⁴²

In discussing the reach of the proscription contained in Section 5 against voting changes having a racially discriminatory effect, this Court in *Beer v. United States*, *supra*, slip op. at 10, relied in part upon Congress' admonition that Section 5 "can only be fully satisfied by determining * * * whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting * * * ." H.R. Rep. No. 94-196, 94th Cong., 2d Sess. 60 (1975). This Court has in fact consistently held that Section 5 is not concerned simply with the removal of direct impediments to the right to vote but encompasses as well changes in voting practices and procedures that have the potential for "dilu-

⁴² See 28 C.F.R. 51.10(b)(5)-(6); see also *Georgia v. United States*, *supra*, 411 U.S. at 540.

tion of voting power." *E.g.*, *Perkins v. Matthews*, *supra*, 400 U.S. at 390; *Allen v. State Board of Elections*, 393 U.S. 544, 569.

It has become increasingly apparent since the original enactment of the Voting Rights Act in 1965 that measures having the effect of diluting minority voting potential are quickly replacing more direct impediments to the right of members of minority groups to participate in the electoral process. As early as 1968 the United States Civil Rights Commission reported to Congress, after an eighteen-month study of the operation of the Voting Rights Act, that "[i]n areas where [minority] registration has increased, we have moved into a new phase of the problem [of disenfranchisement]." ⁴³ The Commission found that political boundaries were being manipulated in an effort "to dilute the newly gained voting strength of Negroes." ⁴⁴ The Commission's report explained that this was being achieved by dividing minority communities and placing the resulting fragments into predominantly white districts.⁴⁵ These findings were prominently and repeatedly referred to during the Senate and House hearings held in 1969 and 1970 in connection with

⁴³ *Political Participation*, A Report of the United States Commission on Civil Rights, p. 177 (1968).

⁴⁴ *Ibid.*

⁴⁵ *E.g.*, *id.* at 26-30.

Congress' extension of the Voting Rights Act.⁴⁶ They were also discussed in both Houses during the floor debates preceding extension of the Act."

During the deliberations that preceded Congress' decision in 1975 again to extend the Voting Rights Act, Congress was informed by the Civil Rights Commission that the use of redistricting measures having the effect of diluting minority voting strength had become "the most serious problem for minority voters" and that "[t]he greatest use of Section 5 has been in preventing such practices."⁴⁷ Congress was also informed that the Attorney General had interpreted Section 5 as requiring him to object to re-

⁴⁶ *E.g.*, Hearings on H.R. 4249, H.R. 5538, and Similar Proposals (Voting Rights Act Extension) before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., pp. 3-4 (1969) (statement of Rep. McCulloch); *id.* at p. 17. (testimony of Howard Glickstein, Acting Staff Director, United States Commission on Civil Rights); *id.* at p. 150 (testimony of Thomas E. Harris, Associate General Counsel, AFL-CIO); Hearings on S. 818, S. 2456, etc. (Amendments to the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., p. 47 (1969) (testimony of Frankie Freeman, Member, United States Commission on Civil Rights); *id.* at p. 132 (testimony of Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights); *id.* at 427 (statement of Howard Glickstein); *id.* at p. 518 (testimony of David Norman, Deputy Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice).

⁴⁷ *E.g.*, 115 Cong. Rec. 38486 (1969) (remarks of Rep. McCulloch); 116 Cong. Rec. 5520-5521 (1970) (statement of joint views of Senators Bayh, Burdick, Cook, Dodd, Fong, Hart, Kennedy, Mathias, Scott and Tydings); 116 Cong. Rec. 6358 (1970) (remarks of Senator Bayh).

⁴⁸ *The Voting Rights Act: Ten Years After*, A Report of the United States Commission on Civil Rights, p. 345 (1975).

districting measures submitted to him having the effect of minimizing the number of districts with predominantly non-white populations.⁴⁹ The Senate and House reports recommending the extension of the Act to 1982 specifically referred to these considerations, and expressed the hope that the Act would continue to be administered so as to increase the opportunities available to minority-group members for election to public office.⁵⁰

As previously stated, it would be anomalous indeed were the good faith efforts of the State of New York to comply with the Voting Rights Act, by avoiding the enactment of a redistricting plan for Kings County having a racially discriminatory effect, held unconstitutional because those efforts involved a consciousness of ultimate racial impact. While it may have been theoretically possible for the State to have developed a redistricting plan for Kings County, complying with Section 5's effect standard, without hav-

⁴⁹ *E.g.*, Hearings on S. 407, S. 903, etc. (Extension of the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., p. 553 (1975) (statement of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice); *id.* at 1038 (statement of Howard Glickstein); Hearings on H.R. 939, H.R. 2148, etc. (Extension of the Voting Rights Act) before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess., pp. 252, 262 (1975) (statement of J. Stanley Pottinger); see also *The Voting Rights Act: Ten Years After*, A Report of the United States Commission on Civil Rights, pp. 204-327 (1975).

⁵⁰ S. Rep. No. 94-295, 94th Cong., 1st Sess. 14 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 7 (1975).

ing considered the plan's racial impact prior to submitting it for federal preclearance, nothing in the Constitution required the State to adopt such a head-in-the-sand approach to its statutory and constitutional responsibilities.⁵¹ This is well illustrated by the annexation cases that have reached this Court under Section 5.

In *City of Petersburg v. United States*, 354 F. Supp. 1021, a three-judge district court in the District of Columbia denied the city's request for a declaratory judgment under Section 5 after having found that the proposed annexation of a predominantly white area, combined with at-large councilmanic elections and racial voting, would effectively preclude black voters from electing a member of the minority community to the city council. The court retained jurisdiction over the case, however, and indicated that the annexation would be approved if the city were to "shift from an at-large to a ward system of electing its city councilmen" (*id.* at 1031). Thus, in order to gain approval of the annexation, the city was required to adopt a change in voting procedures having as its principal purpose the "neutrali[zation] to the extent

⁵¹ In extending the Voting Rights Act for an additional seven years in 1975, Congress understood that jurisdictions subject to the Act would have to take race into account in order to avoid proposing voting changes that would have a racially discriminatory effect if implemented. *E.g.*, Hearings on S. 407, S. 903, etc. (Extension of the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st. Sess., p. 1039 (1975).

possible [of] any adverse effect upon the political participation of black voters" (*ibid.*). This Court affirmed the district court's decision (410 U.S. 962).

This Court was again confronted with a challenge to the permissibility under Section 5 of the annexation of a predominantly white area, altering the racial composition of a jurisdiction subject to the Voting Rights Act, in *City of Richmond v. United States*, 422 U.S. 358. The Attorney General had originally objected to the annexation on the ground that the voting strength of black voters in Richmond would have been reduced in the at-large city council elections. The Attorney General suggested, however, that the city might cure this effect, prohibited by Section 5, by adopting single-member districts to replace the existing at-large arrangement. The city subsequently adopted that suggestion, and this Court, reiterating that "*Petersburg* was correctly decided" (422 U.S. at 370), held that the resulting single-member districts effectively remedied the problems that had concerned the Attorney General (422 U.S. at 367-372).

Thus, both *City of Petersburg* and *City of Richmond* involved voting changes made or recommended with a consciousness of race to avoid adversely affecting the voting strength of minority voters. In both cases, such remedial race-consciousness was approved by this Court. Since the 1974 redistricting plan for Kings County was neither "conceived [n]or operated as [a] purposeful [device] to further racial discrimination" (*Whitcomb v. Chavis*, *supra*, 403 U.S. at 149)

and, as discussed earlier, the plan is not racially discriminatory in effect, petitioners' challenges to the plan were correctly rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1976.

APPENDIX

The racial composition of the state senate and assembly districts provided for in the 1972 and 1974 plans for Kings County are as follows:

District	Total population in district ^c	1972 plan ^a	1974 plan ^b
		Percent Negro & Puerto Rican ^d	Percent Negro & Puerto Rican ^d
Senate:			
15 (portion within Kings County)	(17, 523)	(. 9)	
whole-----	304, 005	1. 0 -----	
16-----	304, 004	52. 7 -----	
17-----	304, 002	33. 9 -----	76. 7
18-----	304, 004	90. 3 -----	71. 6
19-----	304, 004	17. 9 -----	
20-----	304, 002	. 9 -----	
21-----	304, 001	9. 1 -----	
22-----	304, 000	5. 2 -----	
23-----	304, 001	35. 4 -----	69. 8
25 (portion within Kings County)	(152, 471)	(82. 7)	(33. 4)
whole-----	304, 001	61. 0 -----	36. 2
Assembly:			
38 (portion within Kings County)	(65, 884)	(36. 1)	
whole-----	120, 768	19. 9 -----	
39-----	120, 767	15. 4 -----	
40-----	120, 769	75. 7 -----	75. 7
41-----	120, 767	21. 0 -----	
42-----	120, 767	1. 1 -----	
43-----	120, 767	29. 3 -----	
44-----	120, 768	24. 6 -----	
45-----	120, 769	. 9 -----	
46-----	120, 769	9. 3 -----	
47-----	120, 767	. 4 -----	
48-----	120, 768	2. 3 -----	
49-----	120, 769	1. 0 -----	

District	Total population in district ^a	1972 plan ^a	1974 plan ^b
		Percent Negro & Puerto Rican ^d	Percent Negro & Puerto Rican ^d
50 -----	120, 768	11. 9 -----	
51 -----	120, 767	12. 2 -----	
52 -----	120, 768	29. 5 -----	
53 -----	120, 769	86. 1	84. 1
54 -----	120, 769	85. 9	85. 9
55 -----	120, 768	92. 4	80. 9
56 -----	120, 769	92. 5	87. 7
57 -----	120, 768	59. 5	63. 2
58 -----	120, 768	31. 9 -----	
59 -----	120, 768	51. 9	67. 3

NOTES

^a The State of New York supplied two sets of statistics in connection with the submission of its 1972 reapportionment plans to the Attorney General. The figures set forth above concerning the 1972 plan are derived from the second set of statistics submitted by the State (App. 252-255), which were relied upon by the Attorney General in reviewing the 1972 plans (see App. 294). The second set of statistics resulted from application of a formula designed to alleviate apparent errors in the 1970 census data concerning the number of Puerto Ricans living in New York City (see App. 267-268).

^b The State did not supply statistics for the state senate and assembly districts provided for by the 1974 plan for Kings County, except as indicated above (see App. 195-196; Pl. Exh. 3).

^c See App. 248-256.

^d These figures represent only the percentage of Negroes and Puerto Ricans in the total population in the various districts. The Attorney General did not receive any submissions suggesting that the voting rights of persons in Kings County other than blacks and Puerto Ricans would be abridged in the event the 1972 plan were implemented. In no electoral district in Kings County do non-whites, other than blacks and Puerto Ricans, account for more than 2 percent of the total population (see App. 252-255).

FOR ARGUMENT

Supreme Court, U. S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,
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v.
HUGH L. CAREY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

Amidst a blizzard of citations to legislative materials which bear remotely, if at all, on the precise constitutional issues now before the Court, the three briefs filed on behalf of the respondents make sweeping assertions and dire predictions that may fit some other claim in some other case, but ignore the unique disquieting features of this record which are, we believe, dispositive. If one read only the respondents' briefs and had no other source of information regarding this case,

one might suppose that it is an action instituted by an avaricious white majority seeking to overturn the considered and deliberate judgment of a State legislature which had decided to remedy a history of intentional and sustained exclusion of blacks from the political process by evaluating racial housing patterns in a fair and realistic way and altering district lines so as to give all voters, regardless of race, an equal franchise. If those were the facts of this case, these petitioners—and, we believe, the *amici* who have joined us—would be among the first to argue that the policies of the Fourteenth and Fifteenth Amendments and the Voting Rights Act would require, and not conflict with, the legislative judgment.

The questions presented on our undisputed facts are, however, entirely different. We have here not an apportionment developed, as the Solicitor General would describe it, with only “a consciousness of the plan’s racial impact” (US Brief 39), or with race merely taken “into account,” as the intervenors would have it (NAACP Brief 32), but with a crude unvarnished racial quota as the dominant, and possibly exclusive, criterion. Nor does this case involve any finding or conclusion, by any official body—be it legislative, administrative, executive or judicial—that there has been either exclusion of blacks from the political process or minimization of black voting strength by reason of any past State policy or practice such as to require or warrant remedial action. And the undisputed history of this challenged 1974 reapportionment, enacted in a frenzied effort to dodge the coercive blows of the federal government, renders it totally distinguishable from the calm legislative action, based on a careful and deliberate policy determination, sustained by this Court in *Gaffney v. Cummings*, 412 U.S. 735 (1973).

1. There was no free legislative choice.

Both the Solicitor General and the State respondents seek to analogize New York’s 1974 apportionment to the 1971 apportionment of the Connecticut legislature which this Court sustained in *Gaffney v. Cummings*, 412 U.S. 735, 751-754 (1973). The constitutional issue in *Gaffney* was whether a standard of “political fairness” deliberately chosen for Connecticut’s districting—under which each district was drawn “with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties”—was an invidiously discriminatory gerrymander under the Fourteenth Amendment. This Court decided that it would not attempt “the impossible task of extirpating politics from what are the essentially political processes of the sovereign States,” and it refused to interfere with the State’s choice “fairly to allocate political power to the parties in accordance with their voting strength.” 412 U.S. at 754.

We have some initial question whether the “political fairness” doctrine of *Gaffney* authorizes a parallel deliberate “racial fairness” policy. At two points in the short discussion of this issue in *Gaffney*, this Court distinguished Connecticut’s approach from *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which concerned racial, rather than political, criteria. And—for reasons spelled out more fully in our principal brief—we believe that consciously casting legislative districts along racial lines is contrary to the nation’s egalitarian tradition. While the electoral process in this country may be designed to encourage voters to cast their ballots in accordance with party ideologies, it should not be

structured to encourage voting for blacks or whites, or for religious or ethnic representatives. It may, therefore, be desirable for Connecticut (or any other State) to carve up its districts so that there are a certain number of assured Republican and Democratic seats to reflect the distribution of political strength throughout the State. But is it equally desirable for a State to embark deliberately on a policy of carving out safe Catholic or Jewish districts, or Polish or Italian districts, or black, Puerto Rican or white districts?

Whether such a deliberate racial, religious or ethnic policy, calmly and coolly selected by majority vote of a local legislature, may constitutionally be implemented consistently with the Fourteenth and Fifteenth Amendments may be a debatable constitutional question that the Court should resolve when and if a local legislature makes such a reasoned choice. If such a case were presented, this Court might decide, as it did in *Gaffney*, that even with the harmful encouragement such deliberate decisions give to racial bloc voting, the choice is so much a matter of a State's "essentially political process" that no federal interference is justified.

In this case, the New York legislature did not make a reasoned policy judgment to carve out a specific number of legislative districts with a minimum 65 percent nonwhite population. That result was coerced by the action of a federal official, acting under a questionable interpretation of a federal statute. Thus, no special deference to the State's action is due here because the State itself acted only because it was forced to do so by the federal government. (See pp. 8, 16, *infra*.) Whatever may be the merits of the federal official's judgment

in this matter,¹ this Court should not treat the 1974 New York reapportionment, as it treated the 1971 Connecticut law, as the product of a legitimate legislative process.

2. Race was the dominant, if not exclusive, criterion.

Asserting that the petitioners' argument "ignores the unavoidable realities of legislative redistricting" (US Brief 39), the Solicitor General describes this case as one in which those involved in drawing the lines were only "aware of at least the approximate racial

¹ We do not concede, notwithstanding the Solicitor General's assertion (US Brief 19-20), that the district court lacked jurisdiction to grant relief against the Attorney General. The complaint alleged that the unconstitutional district lines had been drawn "as a result of the erroneous and unconstitutional demands and standards imposed by agents of the defendant Attorney General of the United States" and specified the form of coercion exercised by the Department of Justice (App. 10). A proper—maybe even necessary—party defendant to secure the relief to which the petitioners are entitled is the federal officer who is forcing local officials to deny the petitioners' rights. See the authorities cited in our principal brief at pp. 53-54, n. 22. What we assumed, *arguendo*, at page 51 of our principal brief was that the Attorney General's disapproval of a plan submitted under Section 5 of the Voting Rights Act may not be subjected to judicial review, in and of itself, by a citizen of the jurisdiction who disagrees with it. But if the Attorney General persists in his erroneous view and, pursuant to unconstitutional and impermissible standards, compels local officials to take additional steps which affect the equal voting rights of individual citizens, those citizens may, under Sections 1331 and 1343 of the Judicial Code, secure relief against the Attorney General and all those who act in concert with him and obtain a declaratory judgment that his action is unconstitutional. To hypothesize an extreme situation: What if, following his April 1, 1974 letter, the Assistant Attorney General had insisted that New York enact a statute which gave two votes to every nonwhite voter in the affected districts and only one to each white voter? Could not the Attorney General be joined in an action brought by white voters to declare that statute unconstitutional?

and ethnic impact of possible redistricting plans" (*id.* at 40). Similarly, the intervenors argue that New York could not "close its eyes" or "ignore" or refuse to "take into account" the racial distribution of its voters (NAACP Brief 34-36). And the State respondents assert that a "racially mindless" approach is erroneous because "racial considerations" must be kept in mind "to avoid any unintentional discriminatory effects that prior districting plans may have had. . . ." (State Brief 23).

These arguments, in their varying forms, would be relevant if what the record showed was that New York had drawn up a districting plan based on the host of policies that enter into such a determination, and, as a part of that process, it had checked the effect of such a plan on racial minorities residing in the State. If it had then decided that adjustments in the lines were warranted because, among other considerations, "unintentional discriminatory effects" would result if such adjustments were not made, race consciousness would be involved in the process, but possibly not in an invidious or impermissible manner.

When we speak in our original brief of "race consciousness" or "racial gerrymandering" or "racial districting," we do not refer to this kind of race consciousness. A racial gerrymander is not proved by showing that the legislature knew that particular districts were predominantly white or black any more than racial discrimination in employment is proved by establishing that an employer conducted personal interviews of applicants or viewed photographs from which he could tell whether they were white or black. An employer may surely look at his labor force and decide, if he sees too

few minority employees, that there may be something wrong with his recruitment process. But there is a world of difference between that kind of race-consciousness and the establishment of a racial quota that supersedes *all* other criteria.

On the undisputed facts of this record—which all three respondents' briefs ignore—this case involves a blatant instance of an overriding racial quota. The one individual primarily responsible for drawing the challenged district line was asked whether the 65 percent "minimum standard" was the reason why he made the alteration in district lines that produced the harm to the petitioners. He replied, in words that carry their own emphasis (App. 112):

That was the sole reason.

If an employer testified that the "sole reason" why he hired a certain white employee rather than a black one (or a black in preference to a white) was—to the exclusion of all usual employment factors such as individual skills and education—that he wished to meet a 65 percent racial quota he had set, could there be any question as to the impermissible nature of the discrimination? That is precisely what this record shows—not the well-meaning race consciousness that the respondents describe.

3. No past discrimination is being corrected.

It is curious that the Solicitor General's brief recites, in substantial detail, the allegations regarding the 1972 reapportionment made by the NAACP to the Attorney General (US Brief 8-11)—allegations which were vigorously controverted by both the State Attorney General and by legislators responsible for enacting the law,

and which were in no way credited by the United States in the letter of April 1, 1974, signed by Assistant Attorney General Pottinger.

For its part, the NAACP, as intervenor, continues to assert that its submission to the Attorney General regarding the 1972 law established that non-white voting strength had been "minimized," that non-whites had been "siphoned off," that non-white voters were placed into more "compact" districts, and that there was "racially polarized voting" (NAACP Brief 22-25). But the State respondents have, with equal vigor, denied the NAACP's conclusions, and do not agree, as of this date, with even the more limited conclusion based on burden of proof reached by the Assistant Attorney General (State Brief 17-21, nn. 11, 13).²

On this state of the record, it is totally beside the point to cite cases which permit racial criteria to be used "to ameliorate the effects of past discrimination" (US Brief 43-44), or to implement "remedial measures" (State Brief 19-20). Nothing had been done in or by New York State that required an affirmative ra-

² Among the questionable assertions in the NAACP's submission—which is, we believe, riddled with *non sequiturs*—is this flat observation, following a summary of Assembly, Senate and Congressional districts (App. 222):

Not a single white community of any size is located in a majority non-white district in Kings County.

Of course, these petitioners, the Hasidic community of Williamsburgh—a white community of 30,000 people—was located, under the plan the NAACP was challenging, in the 57th Assembly District, which had a population that was 61.5% non-white and was described as "majority non-white" in the remainder of the NAACP's submission.

cial remedy or that justified what would otherwise be obvious racial discrimination.

The State respondents argue that, as a simple matter of practicality, they found it necessary to use racial criteria "to overcome the objections that the Department of Justice had raised with respect to the prior district lines" (State Brief 21) because the 1972 law had been declared invalid under the applicable regulation sustained in *Georgia v. United States*, 411 U.S. 526 (1973). But that shift of responsibility is precisely why petitioners brought this action against *both* the State officers and the Attorney General of the United States. The former may not justify resort to an unconstitutional measure by insisting that it was necessitated by the demands of the latter.

Conversely, the Attorney General—at whom the State respondents point their finger—may not treat this case as simply one in which a State is engaged in "good faith efforts . . . to comply with the Voting Rights Act" (US Brief 49), ignoring his own role in setting the standard for that action. The nature of the instructions given to the State were described in undisputed testimony (App. 96, 105-106). That testimony proved that the Department of Justice was not expressing any objective of "ameliorating the effects of past discrimination" but was directing the New York legislature to fix a specified non-white percentage, in the neighborhood of 65 to 70 percent, "to effect the possibility of a minority candidate being elected within that district."³

³ Decisions such as *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), and *City of Richmond v. United States*, 422 U.S. 358 (1975), cited by the inter-

**4. Proper implementation of the Voting Rights Act
is not affected.**

Both the intervenor and the Solicitor General suggest that our position, if sustained, would jeopardize the administration of the Voting Rights Act and frustrate the objectives Congress wished to achieve in re-enacting that important legislation (US Brief 47-50, NAACP Brief 11-20). We are told that we "plainly disagree" with Congress' reasons for extending the life of the Act (NAACP Brief 18)—an allegation which we as plainly deny.

We have set out in our principal brief (pp. 4-7), the tragic history of the Hasidic community of Williamsburgh before it arrived in the United States and the slow awakening of that community to the rewards that are offered in a democracy by active participation in politics. Just as the community has become aware of these possibilities, its efforts have been aborted because district boundaries have been manipulated to achieve a particular minimum racial percentage in those districts where Hasidim reside, and where, even prior to

venors and the Solicitor General, do *not* illustrate the proposition that remedial measures are appropriate to overcome *past* discrimination allegedly committed under the statutes that have been invalidated pursuant to Section 5 of the Voting Rights Act. Both were annexation cases, and the effects of an annexation are, of course, *present* effects. What the courts in these cases prescribed were new voting procedures that would neutralize the *current* effects of an annexation that might otherwise, if uncorrected, violate Section 5 and the Fifteenth Amendment. Interestingly enough, none of the respondents' briefs has met the challenge we put forth at pages 37-38 of our brief (echoing Judge Frankel's observation at Pet. App. 46a): How does past racial discrimination in districting have a continuing effect that would require "amelioration" by some means beyond current eradication of the unlawful discrimination?

the manipulation, they were part of a racial minority.⁴ Such manipulation of legislative districts is what the NAACP and the Solicitor General insist was a principal focus of Congressional attention in 1970 and 1975, and we emphatically agree that it should be prohibited. Consequently, we are in full sympathy with the purposes of the Act as it has been extended and renewed.

The flaw in the reasoning of the NAACP and the Solicitor General is that they refuse to recognize that, in certain circumstances, "manipulation" along racial lines may harm white communities, just as it more often harms blacks, Chicanos or Puerto Ricans. The Department of Justice's obliviousness to this need to protect whites as well as blacks is demonstrated tellingly by the extraordinary conclusions reached in the Memorandum that accompanied the Department's approval of the 1974 law (App. 291, 293):

The Voting Rights Act was enacted to "enforce the Fifteenth Amendment . . . and for other purposes." The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race, color or previous condition of servitude. Both the intent and purpose of the Fifteenth Amendment and the Voting Rights Act appears to have been primarily to eliminate discrimination against Negroes, a group which had been long subjected to discrimination in the voting process because of race.

While the legislative history and judicial interpretations of the Fifteenth Amendment do not identify what groups, if any, other than blacks may be protected by the Amendment, we conclude that

⁴ The testimony indicated that under the 1972 lines, the 57th Assembly District, where the Hasidic community was located, was 61.5% non-white.

Puerto Ricans in New York may be considered within the protections of the Fifteenth Amendment and the Voting Rights Act by virtue of both judicial precedent and Congressional determinations.

* * *

In contrast to the foregoing conclusion regarding Puerto Ricans, there was nothing revealed by our review of the circumstances surrounding the adoption of the Fifteenth Amendment, the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political subdivisions under the Act which indicated that Hasidic Jews or persons of Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act. Nor has material supporting that view been brought to our attention by others. We are forced to conclude, therefore, that given what we now know of relevant precedent, these groups are not among those whose rights the Attorney General is commanded and empowered to protect in his consideration of a submission under Section 5 of the Voting Rights Act.

This one-sided view of constitutional and statutory protections was, of course, rejected recently by the Court in *McDonald v. Santa Fe Trail Transp. Co.*, 96 S. Ct. 2574 (1976). The intent of the 1869 Congress which adopted the Fifteenth Amendment was surely no less evenhanded than the intent of the 1866 Congress which enacted what is now 42 U.S.C. § 1981. And we believe that the 1970 and 1975 Congresses would have viewed the racial quota imposed here against whites as no less abhorrent than racial quotas imposed against blacks.

Nor, we believe, did the Congresses that sought to outlaw manipulative devices aimed at diluting the votes of racial minorities intend to authorize Department of Justice employees to make the kinds of judgments and to issue the kinds of instructions that are shown by this record. Mr. Scolaro, the executive director of New York's reapportionment committee, testified that what was "suggested" to him by the Department of Justice was (App. 96):

... that the lines be amended so that in certain areas such as in Brooklyn you should consolidate the Black areas, that is put some additional Blacks into adjacent White areas in order to affect the possibility of greater Black representation in districts that are adjacent to those districts presently being represented by Blacks.

Now, that argument with respect to Brooklyn was just the opposite of that in Manhattan. There they took the position that we had overdiluted the Black population and as a result we should attempt to take the Black populace out of the White areas and create more substantial majorities in the Black districts within Manhattan, and that particularly in the senate districts of Manhattan.

Who is it, one wonders, who is doing the "manipulating" of district lines when, under the guise of good faith administration of the Voting Rights Act, such directives come from Washington?

Moreover, it seems clear that the broad remedial policy which the NAACP views as incorporated in the 1970 and 1975 extensions of Section 5 of the Voting Rights Act are not those that this Court has accepted. In *Beer v. United States*, 96 S. Ct. 1357 (1976), this Court reversed a district court judgment based on a

sweeping interpretation of Section 5 and read it as barring only a new law that would, in comparison with preceding law, constitute "a retrogression in the position of racial minorities." 96 S. Ct. at 1364. New York's 1972 reapportionment was patently not judged by this standard. Not a word in Assistant Attorney General Pottinger's letter contrasts the voting power of non-white residents of Kings County under the 1972 law with their voting power under the 1966 apportionment. To be sure, the opportunity to assert this claim appears now to have been lost, in view of New York's failure to take Mr. Pottinger's decision to court. But it is hardly likely that, as the NAACP asserts, the 1972 Kings County apportionment was illustrative of what Congress wanted to prohibit if, under the standard utilized in *Beer*, it would have been upheld.

Before leaving this aspect of the case, we must note that the intervenors are correct if they assert that we "plainly disagree" with observations made by the Civil Rights Commission regarding desirable voting patterns. We cannot deny that racial choices are made by individual voters as they cast their ballots—although it is not invariably true that "white voters refuse to vote for black candidates solely because of their race" (NAACP Brief 16). To the extent that this phenomenon exists, we believe that the traditions of this country demand that government act in a manner that will overcome and, if possible, eliminate this racial bias, rather than in a manner that is calculated to appease it. A shortage of black elected officials, if one exists, should not be met by gerrymandering all blacks into one or several districts and then encouraging everyone to vote on the basis of race. It should be met by striking down

artificial barriers and encouraging election of individuals on the basis of individual capabilities.

What astounds us most of all about the three respondents' briefs is that none of them even cites, much less discusses, *Anderson v. Martin*, 375 U.S. 399 (1964). If the manipulation of a district line to achieve a 65 percent quota is permissible to accomplish the election of blacks, why should racial designations—which facilitate black voters' recognition of black candidates—be prohibited?

5. What justifies a 65 percent quota?

In our principal brief we put forth three independent arguments. The respondents have addressed their arguments principally to the first of these—our contention that racial districting is *ipso facto* unconstitutional. Our second contention—that there was no past discrimination requiring current correction—is dealt with by the intervenors with the reiteration of their rejected assertions of fact and by the State with a claim that it had no choice, given Mr. Pottinger's decision, but to accept his racial criteria.

We find almost no mention or response in the briefs to our third, and most narrow, argument. What conceivable justification is there for the particular quota remedy used by the Justice Department and the State officials? How is past discrimination cured by fixing 65 percent as the magic number and rejecting both 63.4 percent and the existing 61.5 percent?

The NAACP brief is the only one to provide any response, and its answer can be charitably described as lame. The 65 percent standard, it says, "was only a guideline for projecting when white and non-white eli-

gible voting age populations were equal. . . ." (NAACP Brief 48). If it was a "guideline," it was surely the most precisely followed "guideline" in history. Mr. Scolaro, the reapportionment official, testified that he tried a variety of alternatives which ranged between 61.5 and 63.4 percent, and that nothing he tried "got to 65 percent" (App. 115). On the basis of his discussions with the Department of Justice, he concluded that "anything under 65 would not be acceptable" (App. 106). How much more rigid must a percentage figure become to go from a "guideline" to a "quota"?

CONCLUSION

Although the color of the petitioners' skin places them, for better or worse, in the category of a "majority" race, they are, as we have described in our principal brief, subject to discrimination, in various aspects of life, which is more damaging than that imposed on many minorities. This case illustrates how the inequities caused by deliberate racial distinctions may bring pain even to members of a class that appears superficially to be in privileged status. It proves that racial quotas—particularly in the area of elections—must be recognized as abhorrent and totally impermissible, no matter at whom directed.

For the Hasidim of Williamsburgh, this is a case that tests the assurances given them by those leaders who have been urging that they have confidence in America and join the democratic process that is the lifeblood of this country. The litigation has, unfortunately, pitted this Jewish community (as well as those Jewish organizations which have joined us as *amici*), against the representative of a racial minority that has been the victim of great injustice. By our

argument here, we do not seek to diminish, in any manner, the efforts to correct that injustice. But the Hasidim of Williamsburgh believe that even those zealous for racial equality might heed the advice of King Solomon, by tradition the wisest of men and the author of the Biblical Book of *Proverbs* (XVI: 8):

Better is a little with righteousness
Than great revenues with injustice.

The Hasidim of Williamsburgh know that the events of April and May 1974 wreaked an injustice upon them. They were substantially disabled for one reason, and one reason only—the color of their skin. That disability, they believe, cannot withstand the scrutiny of a fair tribunal, particularly a Court sensitive, as this one has been, to instances of racial discrimination. The Hasidim have brought their case here with trust in the Solomonic maxim that "Righteousness exalteth a nation" (*Proverbs*, XIV: 34).

For the foregoing reasons, the judgment of the court of appeals should be reversed with instructions to enter summary judgment for petitioners.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS
OF WILLIAMSBURGH, INC., et al.,

Petitioners,

v.

HUGH L. CAREY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW
AND PUBLIC AFFAIRS (COLPA)
AND THE AMERICAN JEWISH COMMITTEE
AS AMICI CURIAE

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BRIEF FOR THE NATIONAL JEWISH COMMISSION
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AS AMICI CURIAE

This brief is being filed in support of the petitioners with the consent of the parties.

QUESTIONS PRESENTED

1. Whether the standard employed by the United States Department of Justice, that a proscribed effect "may" exist, is the proper standard by which the Attorney General may disapprove a redistricting plan under the Voting Rights Act.

2. Whether in the absence of a prior history of racial discrimination, a state legislature, at the insistence of the United

States Department of Justice, may redistrict voting districts to create an election district consisting of 65% non-whites and 35% whites for the avowed purpose of maximizing non-white representation.

3. Whether federal remedial action may be invoked in a race case where there has been no finding of prior wrong and there is no reasonable relationship between the presumed wrong and the chosen remedy.

INTEREST OF THE AMICI

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary association of attorneys and social scientists organized to combat religious prejudice and discrimination, and to represent the position of the Orthodox Jewish Community on matters of public concern. COLPA has appeared in those capacities in numerous cases before this Court and other courts.

The American Jewish Committee was incorporated by an Act of the Legislature of the State of New York in 1906. Although its chief purpose is to protect the civil and religious rights of Jews, the American Jewish Committee has from its very inception been devoted to the attainment of these aims for all Americans. Among the numerous cases, not directly concerning the rights of Jews, in which the American Jewish Committee has interceded as *amicus curiae* are *Brown v. Board of Education*, 347 U.S. 483 (1954), *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Lau v. Nichols*, 414 U.S. 563 (1974).

The *amici* submit this brief because they deeply believe that the social and political structure of this nation are imperiled where, as here, government action has purposefully diluted the voting power of one ethnic group in order to strengthen another. Should this exercise of power go unchecked, an insidious and dangerous concept will take hold and undermine our basic freedoms as well as the necessary unity of our diverse and pluralistic society.

PRELIMINARY STATEMENT

This case involves a challenge by members of a community to a districting plan that was designed solely to vitiate their effective participation in the electoral process in order to ensure that a politically less active and organized racial group would elect the representatives of its choice. Contrary to 200 years of tradition in American government, an attempt has been made to guarantee a preordained result within political institutions in favor of a particular racial group. This despite the fact that access to the electoral process by the latter group was demonstrably unfettered and indeed that it constituted a significant majority in the challenged districts. On this record that effort stands as perhaps the rawest and most arbitrary exercise of power the *amici* have witnessed. The United States Justice Department, with the constrained agreement of the New York legislature and the unfortunate concurrence of the courts below, has changed the focus of future actions to attain electoral equality from efforts to secure access to the political institutions of our nation to one of control. A more insidious development and greater potential for racial and ethnic divisiveness is hard to imagine.

Under the 1972 redistricting plan petitioners, who are white, found themselves in an Assembly district that had a non-white population of 61.5%. At the least this percentage should pose no impediment to members of the non-white community to freely organize into an effective political force. Yet the Justice Department deemed this figure inadequate and a 65% non-white majority was deemed required, not because there was a showing of purposeful efforts at, or even an unintended effect of, diluting non-white voting strengths. Nor, indeed was there any evidence of any effort to capitalize on the political passiveness of non-white residents of the area. The only reason given by the Justice Department for the disapproval of the 1972 plan was that certain districts were viewed as having high minority concentration while adjoining minority neighborhoods were diffused into a number of other districts and that it "believe[d] other

rational alternatives exist". (510 F2d at 526) However, while section 5 of the Voting Rights Act grants to the Attorney General authority (pursuant to *Georgia v. United States*, 411 U.S. 526 (1973)) to shift the burden of proof that a districting plan does not abridge the right to vote, here the Justice Department required much more; it required the State of New York to prove that there were no alternative plans that would result in more non-white legislators. Equal access to an electoral process unaffected by discriminatory devices is no longer enough, the Justice Department ruled. The Voting Rights Act was thus used as a lever to coerce the New York legislature to adopt a districting plan that should elect non-white legislators. There is neither judiciary authority nor justification in the Constitution or the Voting Right Act for such an objective.

The perversion of all governmental efforts heretofore at securing equal opportunity is not all that requires reversal in this case. As often happens, the rationales employed to justify dangerous premises are themselves similarly infirm and create their own dangers. Even the Attorney General did not "find" that the proscribed abridgment of the right to vote because of race or color was in fact present under the 1972 plan but only that the "proscribed effect *may* exist." (Emphasis provided). (510 F2d at 517 fn. 5) There was also no relation shown between the 65% figure as a remedy and the chimerical "wrong". The open-ended and unrestrained power assumed by the Justice Department is frightening in its implications and should not, we submit, be countenanced by this Court.

ARGUMENT

I

THE JUSTICE DEPARTMENT EMPLOYED AN INVALID AND UNFAIR STANDARD IN DETERMINING THAT THE 1972 REDISTRICTING WAS INVALID.

Section 5 of the Voting Rights Act prohibits the denial or abridgment of the right to vote. A districting plan could indeed operate to deny or abridge that right. But nowhere did the Justice Department determine that the 1972 redistricting plan had this prohibited effect. Instead, the Justice Department invalidated the 1972 redistricting by boldly asserting, with no proof, that the "proscribed effect *may* exist". (510 F2d at 517 fn. 5) This assertion is wholly inadequate to support the exercise of the supervisory powers granted to the Attorney General by the Voting Rights Act.

In *City of Richmond v. United States*, 422 U.S. 358 (1975), this Court held that in the absence of a purposeful dilution of the voting power of non-whites, the Justice Department has no authority to invalidate a local legislative action. In that case, the City of Richmond had annexed a portion of a neighboring county, thereby increasing the number of white voters in the city. This Court held that if the annexation could be justified by non-racial considerations, the Voting Rights Act would not invalidate a districting plan, fairly drawn, in the context of the city after the annexation. Here, the Attorney General never even asserted that the 1972 redistricting plan was not fairly drawn. Rather, he apparently believed that his authority under the Voting Rights Act permitted (or required) him to insist on a plan which would maximize the voting power of non-whites. It is clear from *City of Richmond* that the Attorney General has no such power. The responsibility for drawing district lines lies with the legislature alone, and only if the legislature acts to create an "unfair" plan can the Attorney General step in. Contrary to the Attorney

General's apparent belief, a "fair" plan is one which is fair to whites and non-whites alike.

The reasoning of this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), is similarly instructive. In that case this Court reversed a lower court decision striking down an Indiana apportionment plan employing multimember legislative districts because it diluted the voting strength of blacks living in a ghetto area. The Court said in *Whitcomb* (at 149-50):

We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen . . . The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides *no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.* (Emphasis provided)

The racial classification which was the underlying premise of the redistricting plan adopted by the New York Legislature at the behest of the Department of Justice was not a remedy for a definable wrong committed by the State of New York against its non-white voters. In fact, New York is only subject to the supervision of the Attorney General pursuant to the Voting Rights Act because of its failure to provide Spanish translations on ballots (510 F2d at 516) and Puerto Rican spokesmen objected to the districting plan at issue here (510 F2d at 529). Indeed blacks and other non-whites have full voting rights in New York and have the same opportunity to vote and be elected as their fellow citizens.

II

THE ARBITRARY MAXIMIZATION OF MINORITY LEGISLATORS IS NOT A CONSTITUTIONALLY PERMITTED GOAL OF GOVERNMENT

The conceded premise underlying the disapproval of the 1972 redistricting plan was that it did not guarantee the election of a candidate elected by non-white members of particular communities. We submit that this premise and the governmental policies emanating therefrom are wholly unconstitutional. One should not believe that all that is at issue here is the maximization of political power of a particular racial group. That alone would, of course, raise the gravest constitutional questions. Mr. Justice Douglas concurring in *Whitcomb v. Chavis*, *supra*, 176-77, stated that it was impermissible to fashion electoral districts "so as to make the voice of one racial group weak or strong, as the case may be." Rather we are beyond that point and are faced with a governmental scheme of flat proportional representation based on race.

Under the facts of this case, is it reasonable to assume that a legislator representing a district that is 65% non-white will be more responsive to his non-white constituents than if his constituents are 61.5% non-white? Surely *election* of a non-white representative is the objective of the 65% figure. This plan thus goes beyond the scheme struck down by this Court in *Anderson v. Martin*, 375 U.S. 399 (1964). In its unanimous opinion, this Court held that the racial designation on the ballot which was at issue in that case, and which would have benefited black candidates, would impermissibly "induce racial prejudice at the polls." (375 U.S. at 402). Can there be any doubt but that the insistence by the Justice Department on its 65% figure not only presumes such prejudice but in fact fosters it.

The intensification of racial considerations at the polls contributes to the exacerbation of racial problems unfortunately rife in our society. Certainly it does not tend towards their alleviation which should be first and foremost in the minds of

governmental agencies. But equally pernicious is its subversive effect on the electoral process as a whole. Mr. Justice Douglas spoke to this in his separate opinion (dissenting on the facts) in *Wright v. Rockefeller*, 376 U.S. 52 (1964) at 67:

"When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one becomes separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here."

Aside from the constitutional considerations we note parenthetically that depriving the white residents in a racially mixed area of equal representation through purposeful dilution of their vote will inevitably add to urban instability by persuading such residents to move and thereby further aggravate racial segregation, the deterioration of the "inner city" and the quality of urban life.

A major problem presently facing virtually every large urban American municipality concerns the economic and social difficulties engendered by ethnic succession of inner city neighborhoods. The swift replacement of one ethnic group, usually urged along by "block busting", with a second, generally less affluent ethnic group, emphasizes racial and ethnic differences and also tends to transform stable neighborhoods into slums. While the causes of this urban ill are many and complex, it should be clear that reducing the political effectiveness of one group at the expense of another signifies to the weakened group that the other is in the ascendancy, thus hastening the course of this destructive phenomenon.

In sum, the touchstone of a free people is equality of opportunity. This is accomplished by insuring that there is free and untrammelled access to the institutions of our society. The gross abuse of power exercised by the Department of Justice in this case, with its ominous implications, underscores the wisdom of abjuring the use of categories which emphasize group membership rather than individual rights.

III

FEDERAL REMEDIAL ACTION MUST BE NARROWLY EXERCISED, ESPECIALLY WHEN RACIAL CLASSIFICATIONS ARE INVOLVED

Recognizing that federal remedial power contains the seeds of serious consequences for important rights, and therefore may represent a dangerous if necessary evil in order to redress wrongs, this Court has always insisted on exactitude in its exercise. In *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) this Court, in discussing the limits of federal remedial power, repeated its earlier statement in *Swann v. Charlotte-Mecklenburg Board of Education* (420 U.S. 1 (1971)) that "the nature of the violation determines the scope of the remedy," and stated further that "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."

It is also well settled that any racial classification emanating from "official state sources" carries with it a heavy presumption of unconstitutionality. *Loving v. Virginia*, 388 U.S. 1, 10 (1967). The kind or degree of deprivation resulting from racial classification is immaterial; nor does it matter that the consequences of such classification fall evenly on more than one race or on all races. *Loving v. Virginia*, *supra*; *Hunter v. Erickson*, 393 U.S. 388 (1969); *Anderson v. Martin*, *supra*.

This court, as well as lower courts, has similarly often expressed the general rule that "[f]ramers of voting districts are required to be color blind." *Ince v. Rockefeller*, 290 F. Supp. 878, 884 (S.D.N.Y. 1968). See also *Gaffney v. Cummings*, 412 U.S. 735, 751 (1965); *White v. Register*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, *supra*, 149-160 (1971); *Mann v. Davis*, 245 F.Supp. 241, 245 (E.D. Va.), *aff'd*, 382 U.S. 42 (1965) ("No line may be drawn to prefer by race or color."); *Kilgarlin v. Martin*, 252 F.Supp. 404, 437 (S.D. Tex. 1966), *rev'd* on other

grounds, 386 U.S. 120 (1967); *Cousins v. City Council of Chicago*, 466 F.2d 830, 842-843 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1973); *Ferrell v. Oklahoma*, 339 F.Supp. 73, 83 (W.D. Okla.), *aff'd* 409 U.S. 939 (1972); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1972); *Howard v. Adams County Board of Supervisors*, 453 F.2d 455, 457-460 (5th Cir. 1972); *Dobson v. Mayor and City Council of Baltimore*, 330 F.Supp. 1290, 1296 (D. Md. 1971).

To be sure, there have been some instances where this Court has permitted race to be taken into consideration in formulating a remedy for undoing damage caused by a prior history of deliberate discrimination by governmental policy (*Swann v. Charlotte-Mecklenburg Board of Education*, *supra*; *Green v. County School Board*, 391 U.S. 430 (1968)). But there has never been a case where this Court sanctioned preferential treatment where there was no evidence of prior discrimination.

Against this backdrop one vainly searches the entire record for any delineation of the putative "wrong" that was to be corrected by the 65% non-white majority. The Attorney General made no finding that there was either purposeful or effective abridgment of the voting rights of minorities. In fact, as we argue above, the Justice Department employed an erroneous standard under the Voting Rights Act. Indeed, the only "finding" remotely related to this question was that New York did not translate its ballots into Spanish, and it is significant that the beneficiaries of the 1974 plan were blacks, not the Spanish-speaking minority. (510 F.2d 525, fn. 4). Further, the record is totally barren of any description of the relationship, rational or otherwise, of the 65% figure to the supposed "wrong". As stated by Judge Frankel in his dissenting opinion below, at 510 F.2d 526:

"[This] case is one where no preexisting wrong was shown of such a character as to justify, or render congruent, a presumptively odious concept of a racial 'critical mass' as a principle for the fashioning of electoral districts. Indeed, it is a case where no official is willing to accept, let alone to claim, responsibility for the requirement of 65% or over non-white."

The abandonment of the 1972 lines resulted from a patently gross abuse of power and marks a significant breach in the traditional restraints on governmental action. The method employed by the Justice Department and adopted by the New York state legislature was to refashion districts solely with a view toward racial composition and a preordained result. One may ask, if the districts involved here elected white representatives despite the 65% figure, could the Justice Department insist on 70% or 75% or 100%? Could the Justice Department insist on gerrymandered districts to combine non-white communities separated from each other?

The possibilities are endless and frightening.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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JAN 15 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., et al.,

Appellants,

v.

HUGH L. CAREY, et al.,

Appellees.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF AMICI CURIAE OF BOARD FOR
LEGAL ASSISTANCE TO THE JEWISH
POOR, INC. AND MARTIN GROSS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75 - 104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., et al.,

Appellants,

v.

HUGH L. CAREY, et al.,

Appellees.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE
A BRIEF AMICI CURIAE

1. The Board for Legal Assistance to the Jewish Poor, Inc., and Martin Gross, who is a resident and voter in Williamsburgh, hereby apply for leave to submit the attached brief.

2. The Board for Legal Assistance to the Jewish Poor, Inc., hereinafter referred to as the Board, is a not-for-profit corporation established to study the problems of providing legal services to the Jewish poor throughout the City of New York. A major purpose of the Board is to "study and do research in areas which Jewish poor require social, recreational and community services.

3. The Board has no funding source and relies upon the volunteer services of its members. The Board serves as the advisor to Community Action for Legal Services-Brooklyn Branch, in all matters relating to Jewish poverty.

4. The Board feels that because it has rendered much-needed legal and social assistance to Williamsburgh residents and is intimately familiar with the community, they would be ideally suited to present an argument from the amicu's unique perspectives.

5. Pursuant to Rule 42 of the Revised Rules of this Court, consent to the filing of this brief was requested in writing of all parties on December 31, 1975. Consent was granted by all, with the exception of the Corporation Counsel who has not responded to our request.

6. The amici are concerned specifically with the problem of protecting the political and social rights of the minority Hasidic community, and, more generally, with the preservation of the principles of racial harmony,

equality, and stability in Williamsburgh. The amici and their counsel believe that their knowledge of the legal and social implications of racially-motivated reapportionment can assist this Court in its consideration of the important issues before it.

C O N C L U S I O N

For the foregoing reasons, the motion to file the attached brief amici curiae should be granted.

Respectfully submitted,

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HUGH L. CAREY, et al.,

Appellees.

On Writ of Certiorari to the
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for the Second Circuit

BRIEF OF MARTIN GROSS AND
BOARD FOR LEGAL ASSISTANCE TO
THE JEWISH POOR, INC.

INTEREST OF THE AMICI CURIAE

Martin Gross resides and votes in Williamsburgh. He contends that, as one of the area's Hasidim, his right to participate in the processes of electoral government--as a voter or as a candidate for office--has been substantially compromised by a racial gerrymander which intentionally undercuts his group's political power.

The Board for Legal Assistance to the Jewish Poor and Martin Gross believe that the reapportionment legislation of 1974 impinges on the integrity and constitutional rights of all the residents of Williamsburgh. They believe that the judiciary must now act to prevent discrimination; and that the courts must come to the aid of all minority groups who are legislatively abused. The amici firmly

contend that the holding of the majority below presents grave dangers to the notion of racial and ethnic equality and must be reversed by this Court.

In the view of the amici, this Court will protect the constitutional rights and social integrity of all the residents of Williamsburgh by reversing the holding of the court below.

QUESTIONS PRESENTED^{1/}

1. Whether a gerrymander of electoral districts based on a quota requirement of 65% non-whites is a valid method to achieve equal electoral representation for non-whites.

2. Whether such a gerrymander is justifiable when, as a result, a unique white community is torn assunder by newly drawn election lines and is thereby rendered politically powerless.

^{1/} We note at the outset that we do not concede the validity of the assumption of the appellees and the majority below that the proposed reapportionment design of 1972 (Laws of New York (1972), ch. 11) was so deficient as to require "corrective action." Quite to the contrary, we firmly believe that the inclusion of a very substantial non-white majority in the appellants' district was more than sufficient to constitute compliance with the mandate of §5 of the Voting Rights Act, 42 U.S.C. §1973c. We furthermore fully concur in the appellants' argument--amply substantiated in their brief--that this Court's decision in City of Richmond (continued)

ARGUMENT

I

A REAPPORTIONMENT TO CREATE A 65% NON-WHITE ELECTORAL DISTRICT CONFLICTS WITH THE CONSTITUTIONAL PRINCIPLE OF RACIAL EQUALITY.

"No army is stronger than an idea whose time has come." V. Hugo, Histoire d'un Crime, conclusion (1852). But noble ideas, like victorious defending armies, sometimes sweep by with such unchecked fury that they leave in their wake more

v. United States, 422 U.S. 358 (1975), vitiates the very core of the position taken by the appellees and the court below; in the absence of any evidence that there were no "objectively verifiable legitimate reasons" attaching to the 1972 apportionment, there is no basis for its invalidation, even if it was discriminatory.

Separate and apart, however, from the issue of the need for "corrective action," the questions we raise in this presentation relate to the appropriateness and constitutional validity of the effectuated "corrective action," particularly in view of the unquestioned dire consequences this action entails for the appellants and their community.

carnage and misery than they sought to avert.

Although the notion of full racial equality was painfully slow to take root in the United States, there can be no question that "equal opportunity" and "affirmative action" are the shibboleths of the day--and rightfully so. To be sure, blacks and other minorities have not yet achieved parity on all fronts. And, indeed, this has been the concern of some benevolent powers who, over the past decade, have continued to put forth well-intentioned programs and solutions which all too often do a disservice to both white and non-white America. It is precisely this type of benign but misdirected thinking which underlay the eleventh-hour slapdash activities of the Justice Department and the New York State legislature and culminated in the unfortu-

nate reapportionment plan of 1974, Laws of New York (1974), chs. 588, 589, 590, 591 and 599.

The Justice Department rejected both the existing apportionment which described a 61.5% non-white Williamsburgh district, and a proposed district with a 63.4% non-white population, because such majorities were not considered sufficiently "safe." To be brutally blunt, the Department sought to guarantee the election of a non-white so that the composition of the state legislature would be more racially balanced. The implicit demand was that non-whites be given a minimum 65% majority--nearly two-to-one--so that, presumably, a white candidate would have virtually no chance of election. The legislature felt it had no choice but to comply.

We most strongly object to this form of racially-motivated reapportionment. A

redistricting plan which draws lines that, on the one hand, circumscribe an overwhelming non-white majority and, on the other hand, recklessly cut in two a cohesive white Hasidic community, is an odious form of gerrymandering, thoroughly repugnant to the principles of free elections. In essence, it transmogrifies the concept of free elections into the proposition that elections are to be free so long as the "right" candidate wins. And its clear message is that white Americans can have their most fundamental rights wrested from them so that minority candidates, in the name of compensatory treatment, can be pushed into elected office. Condonation of such a contrivance would compel us to nod our heads grudgingly in affirmative response to one writer's reductio ad absurdum query:

What would then be wrong with a state's giving Negroes prefer-

ential treatment at the ballot box--say, one man, two votes? If the neutral principle that the Constitution is color-blind is unduly simplistic and inappropriate for the complexities of today's world, why is the equally simple principle of one man, one vote entitled to gentler treatment? Kaplan, Equal Justice in an Unequal World: Equality for the Negro--The Problem of Special Treatment, 61 Nw. U.L. Rev. 363, 382 (1966) (hereinafter "Kaplan").

Attempts to find precedent for racial gerrymandering in earlier decisions of this and other courts fall far wide of the mark. The courts have approved various forms of remedial programs--under such rubrics as "quotas," "compensatory treatment," and "affirmative action"--where the victims of racially discriminatory practices have been powerless to help themselves. Where the doors to the superior schoolhouse, the housing project, the factory loft or the union hall are tightly locked to the black person, a strong

judicial arm must break down those doors. See, e.g., Swann v. Charlotte-Mecklenburgh Board of Education, 402 U.S. 1 (1971) (school busing); Contractors Ass'n v. Secretary of Labor, 442 F. 2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) ("Philadelphia Plan"); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920 (2d Cir. 1968) (public housing project).^{2/}

^{2/} We nevertheless note that the concepts of affirmative action and compensatory racial quotas have been subject to much misunderstanding and misapplication. For example, President Johnson's Executive Order 11246 of 1965, as amended, §202(1), required federal contractors, including institutions of higher education, to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." This was followed by a spate of policy decisions by universities to limit certain open teaching positions to black and women applicants exclusively, regardless of demonstrably superior qualifications of white male candidates. The butterness and re-

(continued)

The issue of racial equality within the electoral process differs fundamentally from the above matters. Poll taxes and literacy tests have long since disappeared. The voting booths are open to all. The Constitution proscribes any device or procedure which makes it impossible or difficult for minorities to attain equal representation. But it does not require, nor does it permit, that any given minority group be

sentment thereby created is well known. Ultimately, the federal government had to backtrack by making it clear that "affirmative action" referred to a broadening of the applicant pool through the recruitment of minorities and women, but did not mean racially or sexually exclusive hiring practices. See Department of Health, Education and Welfare, Memorandum to College and University Presidents (Dec. 1974).

It is no wonder that one court insisted that it would approve remedial racial relief "somewhat gingerly." Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F. 2d 1333, 1340 (2d Cir. 1973).

assured, through gerrymandering or like schemes, of the electoral victory of "their" candidate. The Constitution demands only that minorities be afforded a meaningful opportunity to vote under circumstances which provide them an equal chance to attain proportional representation. Where, as under the 1972 New York State apportionment, non-whites have a fair and realistic opportunity to elect their preferred candidate, the onus falls squarely on the shoulders of the minority community. Unlike schools and jobs, the polls are accessible to every man and woman. Tampering by the legislature or the Justice Department in this instance is not "corrective action," but rather a corruption of constitutional principles.

In Whitcomb v. Chavis, 403 U.S. 124 (1971), this Court reserved a district court decision which declared that provi-

sions in an Indiana apportionment plan creating a multimember district for Marion County were unconstitutional because they minimized the voting strength of blacks living in the Center Township ghetto. Mr. Justice White, speaking for the majority, stated (emphasis added):

We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.... The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system. Id. at 149-50, 155.

"Awareness of racial composition" may be permissible "to correct past constitutional

violations," Swann, supra, 402 U.S. at 25, where the aggrieved racial group cannot itself readily take remedial action; but racial quotas certainly cannot be justified where those seeking redress need only pull a lever.

The reapportionment plan in question is marred by a further fundamental flaw. The racially-motivated districting constitutes, in a word, segregation. The identity of the legislative creature can no more be transmuted through such characterizations as "compensatory racial reapportionment" than could that of the proverbial cow about whose neck hung a sign reading "horse". The creation of preponderantly non-white districts is an act of unmitigated segregation, benign intentions notwithstanding. Remedial use of race in school assignments or employment is justifiable or even desirable because it promotes

the social and constitutional goal of integration. Racially inspired redistricting only frustrates this goal.

There is scant need for us to chronicle this Court's unremitting efforts to eradicate the scourge of racial segregation from our society. See, e.g., Schuro v. Bynum, 375 U.S. 395 (1964) (municipal auditorium); Turner v. City of Memphis, 369 U.S. 350 (1962) (restaurant); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf course); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (public schools). Specifically, an issue parallel to the one at bar was raised in Wright v. Rockefeller, 376 U.S. 52 (1964). The appellants there challenged the constitutionality of the

part of New York's 1961 congressional apportionment statute which defined districts along racial lines and thereby diluted the voting strength of non-whites. The Court held that racial intent had not been proven and it therefore did not reach the segregation issue. Justice Douglas, however, stated unequivocally in his dissenting opinion that districting which results in segregation is unconstitutional. "We should uproot all vestiges of Plessy v. Ferguson...." Id. at 62. The argument by minority group intervenors that the concentration of non-white voters in a single district was advantageous in that it facilitated the election of minority group candidates was soundly rejected by Justice Douglas:

Their theory might be called the theory of 'separate but better off' - a theory that has been used before... in support of municipal segregation in resi-

dential areas... of segregation in restaurants...[and] of delayed integration of municipal parks.... The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards. Id.

Racial segregation is a horror which has plagued this nation too long and has been too long in dying. Can there be any justification for breathing new life into this evil? Any plan which partitions, which draws lines, which builds walls on the basis of race is segregative and therefore wrongful. The Constitution does not brook violations of its cherished rights merely because such violations are labeled "benign." Racial segregation is as unacceptable for "compensatory" purposes as it was for the odious purposes that prompted its insti-

tution.^{3/}

II

THE APPELLEES' PLAN TO COMPENSATE NON-WHITES IS SIMPLISTIC AND IS DOOMED TO FAILURE.

We urge that a redistricting plan

^{3/} One cannot argue that the segregative redistricting plan is valid because it is acceptable to the non-whites who are its "victims." Leaving aside the fact that there has been no showing that the non-whites of Williamsburgh approve of the plan, the argument of itself has no merit. Segregation is on its face unconstitutional. Brown and its progeny have once and for all put to an end State discrimination and segregation. The fact that a racial community may under a particular circumstance not be averse to being segregated does not make such segregation constitutionally permissible.

Indeed, the above argument calls to mind incidents of the late 1960's in which numerous universities witnessed demands by Negro students for exclusively black dormitories and courses. Despite the fact that these students believed that this form of segregation would be beneficial to them, no one would suggest for a moment that such an arrangement could pass the test of constitutionality.

which utilizes nice mathematical formulas to insure the maximization of non-white voting power and at the same time to guard against the "wasting" of minority votes is patently offensive to minority citizens and is ultimately self-defeating. Mr. Justice Douglas broached this subject in his dissenting opinion in DeFunis v. Odegaard, 416 U.S. 312, 343: "One... assumption must be clearly disproved, that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a state is not permitted to place on any[one]."

The drawing of district lines in a manner designed to grant a virtually automatic victory to a minority group candidate is paternalistic and demeaning. "The psychological truth... has only lately begun to be realized, that for the dispossessed benefits granted are not

nearly so sweet as benefits won, and that help, even from a benign overlord, is often seen as humiliating and patronizing." Kaplan, supra, at 382. The implicit assumption is that non-whites cannot be trusted to handle their own affairs; that minorities are somehow incapable of competing with whites for political representation and therefore require electoral handouts. Such thinking is both factually untenable and socially scurrilous. Nor does well-meaning discriminatory social planning pass constitutional muster. "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." DeFunis, supra, 416 U.S. at 342 (Douglas, J., dissenting) (emphasis added).

As Justice Douglas sharply notes in

DeFunis, id. at 343:

If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality.

The enticing tune of today's accordeonist can readily become tomorrow's harsh cacophony. Discrimination and racial favoritism, albeit benign, bear dangerously atavistic seeds: "separate but better off" is too close a kin to its notorious ancestor "separate but equal" and all its attendant inequities. The special treatment accorded blacks--especially when at the expense of other minorities--could well return in the future to haunt all minorities. Kaplan, supra, at 382, has well summed up the problem:

[I]t may be difficult in many practical situations to distinguish between preferential and hostile treatment. As a result, in deciding whether to depart

from the easily applied principle of color-blindness, a court may be influenced by the fact that the upholding of a well-intentioned preference today may serve as a precedent for the allowance of most unpleasant treatment of minorities in the future.

The problems inherent in racial reapportionment make of it a socio-political Gordian knot. One court correctly pointed out in Vulcan Society of New York City Fire Department v. Civil Service Commission of New York, 360 F. Supp. 1265, 1278 (S.D.N.Y. 1973), aff'd, 490 F. 2d 387 (2d Cir. 1974):

Adjustments based upon racial classification, however well-intentioned, contain within themselves the seed of further divisiveness regardless of their benevolent purpose. Attempts to make fair adjustments may be counterproductive and tend to generate resentments which serve to exacerbate rather than to diminish racial attitudes.

Furthermore, the injection of a potent racial ingredient into the electoral

process diverts attention away from genuine political issues and makes race the focal point of elections. In fact, the highlighting of race as a real and relevant factor in elections undercuts a basic principle that has slowly been ingrained in the hearts and minds of America; that skin pigment is not the standard by which to measure a person, that it is not a germane element in a political or any other contest.

[T]he government's intentional and explicit use of race as a criterion of choice is bound--no matter how careful the explanation that this is a "good" use of race--to weaken the educative force of its concurrent instruction that a man is to be judged as a man, that his race has nothing to do with his merit. Citizens, thus besieged by what will understandably be taken to represent two conflicting government-endorsed principles, are likely to listen to the voice they wish to hear. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1259 (1970).

See generally Wright v. Rockefeller, supra,
376 U.S. at 59-62 (Douglas, J., dissent-
ing); Kaplan, supra, at 375-80; O'Neil,
Preferential Admissions: Equalizing the
Access of Minority Groups to Higher Educa-
tion, 80 Yale L.J. 699, 709-11 (1971).

The shapers of the 1974 reapportionment plan apparently seek to justify the paramount importance they attach to the racial factor with the theory that only a non-white can adequately represent non-whites and that, furthermore, minorities naturally prefer and close ranks behind minority group candidates. This proposition is factually baseless; it succeeds only in propogating the myth that skin color predetermines a person's needs and attitudes. There are numerous factors other than race--not the least of which is financial status--which are of equal or greater weight in molding one's socio-

political perspectives. A middle class black will likely have more in common with a middle class white than with a black living at the poverty level.^{4/}

^{4/} We cite an illustrative example:

In the mid-1960's New York City's Council Against Poverty designated the predominantly black Crown Heights section of Brooklyn as one of the official "poverty areas" of the City, thereby making area residents eligible for federal and local anti-poverty funds and services pursuant to Title II of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. §§2781-97. The Council's decision was welcomed by poor blacks and whites of the community, but was bitterly fought by middle-income blacks who resided or owned property in Crown Heights who feared that the stigma of the poverty designation would cause a drop in the value of their real estate holdings and a rise in insurance rates. See T. Calabia, Ethnicity and Poverty in New York City in the 'Seventies' 3 (1974) (hereinafter "Calabia Report").

Surely these middle-income blacks are more interested in legislative representation by solons--black or white--who lend a sympathetic ear to their complaints than in a slate of candidates whose major qualification is their "blackness."

The dynamics of demography further belie the claimed validity of the plan. The framers of the legislation sought to create a district in which non-whites were neither too "concentrated" nor too "diffused." A range of 65-70 percent was viewed as acceptable, any upward or downward variation as objectionable. Consequently the present plan for a minimum 65% non-white majority was adopted. But what will the actual racial percentages be two or four years from now? If New York's population shifts and "white flight" continue apace, is it not probable that the non-white population of the Williamsburgh districts will pass the 70% mark?^{5/} Will a new reapportionment then

^{5/} The ethnic distribution of New York City's population has shown marked changes during the intercensal period of 1960-1970.

(continued)

City-wide, the white majority dropped from 77.78% to 67.21%. The white population declined by about three-quarters of a million, while non-whites (for purposes of this footnote, this category includes blacks, Puerto Ricans, and other non-whites) increased by about 860,000.

The vast bulk of white out-migration was from the City's twenty-six designated "poverty areas." All but six of these areas had by 1970 become exclusively or predominantly non-white.

In Williamsburgh, one of the "poverty areas," non-whites were a 60% majority in 1970; in 1960 they numbered 40%.

See generally A. Burstein, A Demographic Profile of New York City, x and 74-91 (1973); Calabia Report, supra, at 12.

There seems to be no let-up in sight to the City's continued white out-migration, nor to the increment of non-white population and the increasingly segregated residential patterns. It is estimated that if present trends continue, blacks and Puerto Ricans will constitute a majority by the early or mid-1980's. See Calabia Report, supra, at 7.

It should be evident that the assumption that the non-white population of the Williamsburgh districts will for any length of time remain within the narrow range suggested by the appellees is somewhat fanciful.

become necessary? So long as precise racial formulae serve as the sole basis for apportionment, can stability and continuity ever be hoped for? The Court in Ferrell v. Oklahoma, 339 F. Supp. 73,83 (W.D. Okla. 1972), aff'd, 409 U.S. 939 (1972), said:

[I]f a district be carved especially for the blacks (permissible but not required) who can say that it will long remain thus? We judicially notice that through changes in housing patterns, urban renewal, slum clearance, public housing and other factors the minority races are on the move in more ways than one.

Ironically, the very design by which the appellees seek to strip electoral power from Williamsburgh's white citizens and vest it in the non-whites may very well be the latter's political undoing. When laws are enacted which unduly favor minorities in racially mixed areas, racial divisiveness and white frustration are

inevitable. When such laws go so far as to negate the hard-won socio-political attainments of a beleaguered white community whose viability is thereby threatened, it is a virtual certainty that the whites will embark on a search for more hospitable environs. If, instead of inducing whites to remain put with the promise of racial equality and harmony, misguided social engineers antagonize and "punish" them with grand racially-"compensatory" schemes which harshly undercut their political and economic power, the whites will predictably opt for the path of least resistance: flight.

While the white exodus from the nation's urban centers continues unabated, the Hasidim of Williamsburgh are reckoned among the few hardy and high-principled white communities who have rejected the blandishments of the suburban refuge.

Although now living side by side with solidly non-white neighbors, not always friendly, the Hasidim stand fast. They struggle hard to maintain a vibrant community, but feel that they can endure in the effort to surmount the difficulties and hostility only if they have the continued understanding and receptiveness of elected officials. The Hasidim rightly fear that new politicians, catapulted into office as a result of the 1974 reapportionment plan, will--as the appellees themselves expect--have special loyalties to the non-whites, and will not be apprehensive of repercussions at the ballot box. With the Hasidic community being thus left exposed and vulnerable, the Hasidim may have little choice but to pack their bags and seek shelter elsewhere.

The consequence of the appellees'

myopic policy will undoubtedly be quite the opposite of the intended effect. As the Hasidim and other remaining whites feel compelled to leave, Williamsburgh will become ever more "concentrated" with non-whites. The result will be increased ghettoization, dilution of voting power, and a recurrence of the circumstances that roused the blacks of Harlem into litigation in Wright v. Rockefeller, supra.

Indeed, it is no accident that Adam Clayton Powell who, at the time of the Wright decision, had been in office for about twenty years, was an intervenor on the side of the respondents. As noted by Justice Douglas, Powell, together with other political intervenors, had "a vested interest in control of the segregated Eighteenth District." 376 U.S. at 62. Politicians who have been voted into

office by ghetto constituencies on the basis of race can afford to feel safely ensconced in their seats of power. Judicious use of minority catchwords and appeals to racial unity are often sufficient to insure that political factionalism will not be a factor at the poll. If there is a lesson to be learned from the experience of Harlem and numerous other minority communities, it is that the compacting of non-whites into racially and politically monolithic districts increases the likelihood of political neglect and manipulation.

Finally, we cannot allow the appellees' concept of "non-white" to go unnoticed. The requirement of 65% non-whites includes blacks and Puerto Ricans. The artificiality of this formula was recognized by the Justice Department which, in its memorandum of July 1, 1974, sought to bolster the contrived racial combination by stating

that "where black or Puerto Rican candidates have 'white' opposition, the two groups tend to unite behind the 'minority' candidate." This argument is sheer make-weight. If Puerto Ricans have suffered discrimination at the hands of whites, they have fared little better in their relationship with blacks. To cite one example, we turn again to New York City's "community action" (anti-poverty) program. Almost from the program's inception in the mid-1960's, Puerto Rican groups have been fighting fiercely to wrench control of anti-poverty agencies and funds from blacks who had gained early domination. The struggle has been marked by vilification and accusation, venomous political contests, and pitched street battles. See State Charter Revision Commission for New York City, The Community Action Experience, 32, 66, 70, and 73-4 (1973). See

also United Jewish Organizations of Williamsburgh v. Wilson, 510 F. 2d 512, 529 n.4 (2d Cir. 1974) (Frankel, J., dissenting). The fact is that in the very case at bar Puerto Rican groups expressed dissatisfaction with the 1974 reapportionment plan because it weakened their relative voting strength while augmenting that of the blacks. The Justice Department's memorandum blithely dismissed the Puerto Ricans' remonstrances. The conclusion that all non-white groups will march forth in blissful political unity is simplistic and takes no account of the sometimes unpleasant ethnic realities of New York.^{6/}

^{6/} The intensification of racial and ethnic consciousness in the past fifteen years, and the widespread acceptance of a "black-white" dichotomy, have placed Hispanics in something of a demographic limbo. In dealing with Puerto Ricans in particular, demographers and census takers have
(continued)

not been at all certain which label to attach. Although in many census charts Puerto Ricans appear as a separate and distinct group, there seems to be a compelling desire on the part of statisticians to tag them as either black or white. Generally, individual Puerto Ricans themselves seem to have been given the option of deciding their color.

For purposes of social welfare programs, government officialdom has for the most part been grouping Puerto Ricans together with blacks. Apropos of this official policy we call attention to the caveat proffered in Kaplan, supra, at 381:

"[W]here race is used as a criterion of governmental action impinging on the lives of individuals, and most important, where the government accords differential treatment to individuals solely because of their race, the erosion of the color blindness principle by the government may become...serious.

"The damage that such governmental action can do is sometimes quite difficult to predict in advance. An argument can be made that the assimilation of the Puerto Ricans in New York was proceeding better before they were officially classified as Negroes for the purpose of perfectly well-intentioned programs. The effect
(continued)

After the platitudinous veneer is peeled from the 1974 reapportionment law, a careful scrutiny reveals it for what it is: a plan bereft of constitutional or social validity. A blatant racial quota system is utilized which bodes ill for both the white and non-white community. Constitutional principles of equality and integration are thrown to the wind, to be replaced by groundless assumptions, baseless theories, and wishful thinking. This Court cannot allow the ideal of racial equality to be sacrificed on the alter of good intentions.

of the law has been to stamp them more clearly as a group apart, a designation to which both they and the rest of society could not help but react."

It is no wonder, then, that of the 811,843 Puerto Ricans in the City in 1970, 741,218 (91.3%) were listed as white, while only 70,625 were listed as black. Burstein, supra, at 76n.; see also Calabia Report, supra, at 9.

III

A REAPPORTIONMENT PLAN WHICH DIVIDES A UNIQUE, COHESIVE HASIDIC COMMUNITY AND THEREBY SUBSTANTIALLY ATTENUATES ITS VOTING POWER IS INVALID.

In our arguments above, we challenged the validity of compensatory racial reapportionment, as applied by the appellees, on constitutional and other grounds. We now further contend that, even if under pristine circumstances such reapportionment may have merit, it is nevertheless indefensible here because of its politically crippling impact on the appellants.

This Court has expressed its views on the franchise in no uncertain terms in Reynolds v. Sims, 377 U.S. 533 (1964):

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative gov-

ernment. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

The Court called for an "aware[ness] that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination' Lane v. Wilson, 307 U.S. 268....," id., at 563, and further approvingly quoted the words of Mr. Justice Black in Colegrove v. Green, 328 U.S. 549, 571 (1946) (Black, J., dissenting):

[A] state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name. 377 U.S. at 563 n.40.

The Court, id. at 555n. 29, also cited Mr. Justice Douglas's admonition that "the federally protected right [to vote] suffers

substantial dilution... [where a] favored group has full voting strength ... [and] [t]he groups not in favor have their votes discounted." South v. Peters, 339 U.S. 276, 279 (1950).

The Court below has already determined that the appellant's have standing in this constitutional controversy as white voters, United Jewish Organizations of Williamsburgh v. Wilson, supra, 510 F. 2d at 521-2. Although appellants have standing as whites, their "measure of damages," to borrow a phrase, must be assessed in the light of the particular condition of the Hasidic community.

The more than thirty thousand Hasidim residing in Williamsburgh are jammed into a small, drab inner city area where tenement houses and storefronts predominate-- a neighborhood which would otherwise be described as a ghetto. Indeed, the seminal

factors that normally breed ghettos are abundantly present. The Hasidic community is in many ways isolated--partly of its own doing and partly because of the antagonism and derision the Hasidim face from other ethnic groups residing about them. A large portion of the Hasidim, including the young, have little or no working knowledge of English. Unemployment among the men (the women rarely work) stands at about 25% and is increasing, N.Y. Times, Nov. 23, 1975, §B, at 5, col. 1. Their refusal to pursue secular education beyond the high school level effectively excludes the Hasidim from white collar jobs. Most of those who are employed work at blue collar, semi-skilled and unskilled jobs. Their singular religious practices (e.g. strict observance of the Sabbath from sundown on Friday to sundown on Saturday and of dietary laws) and

appearance (close-cropped hair, beards, and black suits, hats, and caftans) make it difficult for the Hasidim to obtain and retain employment. Despite the laws enacted in the past decade which forbid religious discrimination in employment, Hasidim continue to face obstacles and harrassment by employers and unions.

Poverty abounds in the community. Families are large: the median number of children is 6.3. Wolfe, The Invisible Jewish Poor, 48 Journal of Jewish Communal Service 6-7 (1972). Even middle-income families are often reduced to near poverty because of such major expenses as yeshiva education for the children, expensive kosher food, and charitable contributions. Welfare is almost never resorted to.

Yet those multitudinous evils which we have come to routinely expect in improv-

erished ghetto areas are virtually nonexistent in Hasidic Williamsburgh. Crime and violence, juvenile delinquency, drug addiction and alcoholism, prostitution and venereal disease, filth and decay--all are conspicuously absent.

In addition to a network of religious schools and institutions, the community has programs to provide housing, emergency medical assistance, food and other necessities for the indigent, scholarship funds, vocational training, free loans for the needy, assistance to small businessmen and a host of other services. Indeed, Hasidic Williamsburgh represents what is perhaps a unique phenomenon in this nation. While there have been other such self-reliant religiously-motivated communities in the more idyllic sections of the country, few if any have remained viable and vibrant in

the heart of the urban maelstrom. It is further noteworthy that since the federal government does not recognize Jews as a minority group, the Hasidim have never been eligible for the special considerations given other minorities.

The homogeneity of the Hasidic group is of course apparent in the uniformity of language, dress, and religious devotion. Serving as a further binding factor are the searing memories of the Holocaust and of Stalinism. Few of the Hasidim are more than one generation removed from these horrors. But the Hasidim have never sought pity or favoritism. They sought, and believed that they had found in this country, an environment of freedom in which their inner resources and perseverance could achieve for them the stability and self-determination they

longed for.^{8/}

Certainly the accomplishments of the Hasidim bear witness to their cohesive-ness and determination. But community development cannot continue on a frail economic base. Within the past decade community leaders have come to recognize that future survival depends on some measure of political activity. The Hasidim have never sought headlines nor have they engaged in the politics of confrontation. But, under the prodding of their leadership, they have been awakened to the fact that the strength they exhibit at the polls will insure that there will be some

^{8/} Interestingly, and not without irony, is the fact that a small but growing number of the Hasidim are recent emigres from the Soviet Union. Religious discrimination, "central planning," and policies of pitting ethnic groups against each other, are among the harsh realities of Soviet life that these Hasidim sought to escape.

legislative voices raised in their defense. At this juncture, the Hasidim are all well aware that the underpinnings of their past and present growth lie in the institutions of representative government.

The concept of participating in governmental processes was slow to gain a foothold among the Hasidim. The older generation had been raised in an Eastern European milieu in which the government was hated and feared. After their arrival on these shores, their suspicions of all political entities remained and were often adopted by their children. Despite initial skepticism, however, a political consciousness began to grow among the Hasidim as they painstakingly developed an understanding of the workings of democracy. Eventually the Hasidim came to rely heavily on their political representatives in their struggle against poverty, dis-

crimination, abuse and neglect. The voice of a united Hasidic Williamsburgh which called attention to such needs as housing and education was clearly heard in political chambers. The community lived with hope. Now that hope has been dashed. An act of legislative legerdemain--one line rudely drawn through Hasidic Williamsburgh--has politically silenced the Hasidim.

The Hasidim are the apotheosis of the "discrete and insular minorities" to whom Justice Stone gave special recognition, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

"[P]rejudice against [them] ... may be a special condition... which may call for a correspondingly more searching judicial inquiry." Id. For such minorities, "heightened judicial solicitude is appropriate," Graham v. Richardson, 403 U.S. 365, 372 (1971). In fact, this Court has

been zealous to acknowledge the unique needs and conditions of "discrete minorities" and to protect these groups from wrongful legislative pressures. A case in point is Wisconsin v. Yoder, 406 U.S. 205 (1972), in which this Court held that a state could not constitutionally compel Amish parents to send their children to high school. The Court reasoned that since the Amish people are law-abiding and fully productive, there can be no justification for forcing them to violate religious prohibitions against secular education.

The present plight of the Hasidim begs for judicial inquiry and solicitude. An isolated and hitherto silent minority with a history of persecution matching that of the most oppressed of groups--and with aspirations realizable only through elective representation--is now effectively

disenfranchised. We reject any argument that here, as in certain cases of "affirmative action" in employment, whites must suffer reverse discrimination in order to compensate previously underprivileged non-whites. This contention may have some merit when the whites in question are those who comprise mainstream America, but it is clearly not valid when the whites themselves are a distinct minority who have also been the victims of privation and discrimination. Furthermore, the nature and impact of limited discriminatory hiring practices are not nearly as severe as those of disenfranchisement.

"[T]he right of suffrage is a fundamental matter in a free and democratic society....

[It] is preservative of other basic civil and political rights." Reynolds v. Sims, supra, 377 U.S. at 561-2. The reapportionment plan which dilutes the vote of

the Hasidim and mutes their political voice should not be graced with this Court's imprimatur.

CONCLUSION

The struggle for racial and ethnic equality has troubled and convulsed our society virtually from this nation's birth. The cost of victory, or near-victory, has been too high: too many lives, too many tears, too many battles. If there is to be an ultimate purpose and meaning to the sacrifices that we as a people have made, we must be ever vigilant that the purity of our principles never be compromised. It would be tragically ironic if the long struggle for racial equality and harmony were to climax in legislatively-sanctioned inequality.

It is a truism that racial favoritism is the flip side of racial discrimination. In providing supposed political compensation to certain minorities, the appellees have, with the same stroke, taken from another minority one of "our most precious freedoms" -- "the right... to cast votes effectively." Williams v. Rhodes, 393 U.S. 23,30 (1968). In the process they have inflicted racial wounds on both white and non-white Williamsburgh from which the community may never recover. And perhaps most unfortunate, the appellees have, albeit unwittingly, set in motion forces whose vile tentacles reach far beyond the borders of Williamsburgh. We urge this Court to stay the hand of those who seek to "sow the wind" but fail to see that "they shall reap the whirlwind." Hosea 8:7. The judgment of the Court of

Appeals should be reversed.

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No. 75-104

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., *et al.*,
Petitioners,

v.

HUGH L. CAREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit

**BRIEF OF
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LEAGUE OF B'NAI B'RITH and JEWISH LABOR
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IN THE
Supreme Court of the United States

October Term, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, *et al.*,
Petitioners,

v.

HUGH L. CAREY, *et al.*,
Respondents.

**On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit**

**BRIEF OF
AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION
LEAGUE OF B'NAI B'RITH and JEWISH LABOR
COMMITTEE, AMICI CURIAE, IN SUPPORT
OF PETITIONERS**

Petitioners have challenged certain reapportionment laws adopted by the State of New York, in so far as they affect areas of Kings County, on the ground that the district boundaries were purposefully drawn on the basis of race, in violation of the 14th and 15th Amendments to the United States Constitution. Their complaint was dismissed and the decision was affirmed, 2 to 1, by the Court of Ap-

peals for the Second Circuit. A petition for writ of certiorari to review the judgment of the Court of Appeals was granted by this Court on November 11, 1975.

Interest of the *Amici*

This brief is submitted on behalf of three national Jewish organizations, the American Jewish Congress, the Anti-Defamation League of B'nai B'rith and the Jewish Labor Committee. The American Jewish Congress was founded in 1908 and the Jewish Labor Committee in 1934. The B'nai B'rith was founded in 1843 and established the Anti-Defamation League as its educational arm in 1913.

All three of these organizations are concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since their creation, they have opposed racial and religious discrimination in voting, employment, education, housing and public accommodations. Among their activities devoted to these ends, they have filed briefs as *amici* in this Court in cases where it was felt that the rights of any racial, religious or ethnic group have been threatened. These cases have included *Shelley v. Kraemer*, 344 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 374 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Lau v. Nichols*, 414 U.S. 563 (1974).

More specifically, in the area of voting rights, certain of the *amici* filed a friend of the Court brief in *Cardona v. Power*, 384 U.S. 672 (1966), urging the unconstitutionality

of the New York State literacy test on the grounds that it unlawfully disenfranchised American citizens of Puerto Rican origin.

We submit this brief because we believe that our system of constitutional liberties is impaired when the law gives sanction to the use of race in the decision-making processes of governmental agencies, except in certain circumstances where it is necessary to correct past purposeful discrimination.¹ We regard as unsound the basic postulates on which the 1974 New York reapportionment statutes rested. If those postulates and the resulting reapportionment are upheld, sanction will be given to racial proportional representation, racial and ethnic divisiveness will be intensified, and the process of popular elections on which our government rests will be seriously distorted.

Accordingly, *amici* have sought and obtained the consent of the parties to this case to the submission of this brief.

Statement

Early in 1972, the State Legislature adopted Chapter 11 of the Laws of New York, 1972, reapportioning the legislative districts of the state on the basis of the 1970 census. Because a literacy test had been in effect until 1970 and

1. It is the view of *amici* that, under the First Amendment, the limitations on governmental discrimination based on race are to a large extent applicable also to discrimination based on religion. We confine ourselves in this brief, however, to considerations of distinctions based on race. That is the only issue involved at this stage of the proceedings since petitioners do not question here the unanimous conclusion of the Court of Appeals that they lacked standing to sue as a religious group and that they had no right to relief as such a group (510 F.2d at 250-51).

because less than 50% of the voting age residents in Kings County and two other counties in New York State had voted in the presidential election of 1968, it had been determined that the trigger provisions of Section 4 of the Voting Rights Act (42 U.S.C. 1973b) applied to these areas.

In late 1971, the State of New York sought and obtained a consent judgment under Section 4(a) of the Voting Rights Act, exempting the three counties from the operations of the Act on the ground that in the preceding ten years the literacy test had not been used with a discriminatory purpose or effect. Before consenting to this judgment, the Department of Justice conducted a four-month investigation which included an examination of registration records of selected persons within the three counties, interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties. In addition, New York officials submitted affidavits indicating a less than 5 percent failure ratio among all applicants taking the literacy tests in the affected districts and attesting to registration drives conducted during the 1960's in predominantly black and Puerto Rican areas. Based on the Department's own investigation and the State submissions, David L. Norman, Assistant Attorney General in charge of the Civil Rights Division, concluded that there was no reason to believe that a literacy test had been used in the three counties with discriminatory purpose or effect. He noted, in an affidavit, filed April 3, 1972 (Affidavit of Assistant Attorney General Norman, filed April 3, 1972, in *New*

York v. United States of America, Civil Action No. 2419-71):

New York presently has suspended all requirements of literacy as a condition of registration and voting as required by the 1970 Amendments to the Voting Rights Act. Our investigation revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color.

Accordingly, application of the Act to these counties was lifted on April 3, 1972. It was subsequently restored on the basis of a ruling in a 1973 proceeding that the State's failure to provide a Spanish translation of the ballots used in the 1973 election constituted illegal use of a literacy test in violation of the Act. *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1973).

Section 5 of the Act (42 U.S.C. Section 1973c) requires approval by either the United States District Court for the District of Columbia or the United States Attorney General of any change in the laws affecting voting in a state or county held subject to Section 4 of the Act. Accordingly, Chapter 11 of New York's 1972 Laws, which routinely reapportioned the State Legislature on the basis of the 1970 Census, was submitted to the Attorney General for approval insofar as it applied to the three counties held to be covered by Section 4 of the Voting Rights Act.

On April 1, 1974, the United States Department of Justice, through Assistant Attorney General J. Stanley Pottinger, informed the New York Attorney General's office that the redistricting in Kings and New York Counties was

not acceptable because "we cannot conclude, as we must under the Voting Rights Act, that those portions of these redistricting plans will not have the effect of abridging the right to vote on account of race or color." The Attorney General noted that certain of the lines in these areas "appeared to have the effect of overly concentrating" minority populations in certain districts while "diffusing" the remaining minority population into a number of other districts.

Because of the imminence of the primary and general elections of 1974, the state did not exercise its right to challenge this ruling but proceeded to adopt new apportionment laws for those two counties. (Laws of New York (1974), Chapters 588-591 and 599). It is not questioned that these statutes were drafted to meet the objections expressed by the Department of Justice in the April 1 letter and that New York's legislative draftsmen understood that in order to meet these objections it was necessary to draw the lines in such a way as to assure that there would be three Senate and two Assembly districts in Kings County with non-white majorities of at least 65 per cent. New district lines, so drafted, were enacted and again submitted to the Attorney General. In a Memorandum of Decision dated July 1, 1974, they were given the approval required by statute.

These proceedings were initiated in the United States District Court for the Eastern District of New York on June 1, 1974. Petitioners (plaintiffs below), are organizations of voters residing in areas of Kings County affected by the new apportionment laws. They challenged the constitutionality of the 1974 laws, asserting their rights, both

as whites and as members of a discrete religious group, to legislative boundary lines drawn without conscious, deliberate effort to establish specific racial proportions in designated districts.

Question Presented

Under the 14th and 15th Amendments, may apportionment laws be deliberately drawn to assure minority groups voting control in certain legislative districts, where there has been no affirmative finding that the prior apportionment was designed to reduce or suppress minority representation?

ARGUMENT

The use of racial quotas to determine legislative district boundaries is not justified by anything in this record and violates constitutional prohibitions of racial preferences in official decision-making.

A. The Basic Prohibition of the Use of Racial Factors

All parties to this case, and both the majority and dissenting judges in the court below, agree that the challenged state legislative plan was "specifically drawn to ensure nonwhite voters a 'viable majority' . . . in state senatorial and assembly districts." 510 F.2d 512, 514. As more particularly described by the dissenting judge below: " * * * [T]he Legislative Committee staff proceeded to redraw lines under a controlling mandate to see that seven Assembly and three Senate districts had nonwhite majorities of 65 percent or greater. The 65 percent figure was taken on

the explicit premise that anything less (given lower rates of voter registration and turnout) would render uncertain the power of the nonwhite majority to control election results in those districts."

Basic to our principles of representative democracy is the requirement that voting districts be established without regard to race or color. This principle is enshrined in the Fourteenth and Fifteenth Amendments and has often been stated by the Federal courts at all levels. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Fortson v. Dorsey*, 379 U.S. 433 (1965); *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1973); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Mann v. Davis*, 245 F. Supp. 241, 245 (E.D. Va.), aff'd 382 U.S. 42 (1965); *Kilgarlin v. Martin*, 252 F. Supp. 404, 437 (S.D. Tex. 1966), rev'd on other grounds, 386 U.S. 120 (1967); *Cousins v. City Council of Chicago*, 466 F.2d 830 (7th Cir. 1972), cert. denied, 409 U.S. 893 (1973).

The opprobrium rightly attaching to racial gerrymandering finds its counterpart in other aspects of our national life. The allocation of a "proportionate" share of available jobs, dwellings, school places or legislative districts to each racial, ethnic or religious segment in the community would fragment and divide our society by treating each group as a monolithic entity entitled, as such, to a prescribed share of each societal facility. Such allocation weakens the fabric of a community sufficiently battered by a wide variety of tensions and emphasizes group difference rather than communal cooperation.

Racial, ethnic or religious quotas, whether in employment, education or housing, offend against our traditional

notions of individual worth and dignity. "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society." *Kirkland and Hayes v. The New York Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975).

Employment of racial quotas in the electoral process is particularly fraught with dangers. As Justice Douglas so eloquently stated in his dissent in *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964):

When racial or religious lines are drawn by the state, the multi-racial, multi-religious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.

By drawing district lines on a racial basis, no less than by labeling a candidate by race on the ballot, the state indicates "that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice." *Anderson v. Martin*, 375 U.S. 399, 402 (1965). In so doing, it reinforces prejudices, confirms perceived differences between the races and totally destroys the state's educative function on behalf of racial equality and neutrality in the political process.

Racial and ethnic quotas in redistricting, moreover, pose immense practical questions leading to absurd, often irreconcilable results. As Judge Frankel stated in his dissent below (510 F.2d at 533):

There are unbearable and absurd implications in the notion of "proportionality" between racial or ethnic

population percentages and percentages of districts controlled by different racial or ethnic groups. Beyond the limited skin-color divisions, some 65 percent white and 35 percent "nonwhite," Kings County has 10.7 percent Italian immigrants or people with at least one parent who immigrated from Italy, some unknown additional percentage of Italian ancestry, a similar figure of 5.9 percent plus unknown additional Russian, 35 percent Puerto Rican, 1.7 percent recently from Austria, 1.7 percent recently from Ireland (plus many more of Irish ancestry), 30.3 percent Jewish, 2.2 percent "other" religions, 1.3 percent recent German immigrants, plus a dizzying mass of others "whose lineage is so diverse as to defy ethnic labels." *DeFunis v. Odegaard*, 416 U.S. 312, 332 (1974) (Douglas, J. dissenting). How do we figure out the percentage of districts to be controlled by German Catholics, Russian Jews, black as against white Protestants, etc.? The short answer is, of course, that we don't. But the apparent "test" in today's majority opinion (31.4 percent nonwhite districts a "good" figure because less than the 35.1 percent nonwhite Kings County population) implies that perhaps we should.

One particularly anomalous result is the fate of the Puerto Rican minority in this case, the principal victims of the English-only ballot which served to trigger application of Section 5 of the Act. Although the Department of Justice in its July 1, 1974, ruling assumed that this group enjoyed the same rights under the Voting Rights Act as Negroes (pp. 10-11), it found no way to give them "proportionate" representation (pp. 14-16).

Judge Frankel's recital of the complications which would result from approval of the challenged New York Statutes and the underlying assumptions on which they

rest is no mere *reductio ad absurdum*. Under the newly enacted extension of the Voting Rights Act, the majority holding below would cause Judge Frankel's elucidation of the "unbearable" burden of attempting to assure electoral proportionality for racial and ethnic groups to become a reality.

The Voting Rights Act as extended now not only covers such non-Southern areas as parts of New York, California, Colorado and Alaska but protects non-English speaking minorities, including Alaskan natives, persons of Spanish heritage, Asian Americans and American Indians. Pub. L. No. 94-73 (July 24, 1975). The complexities of determining initially whether apportionment laws have the "effect" of abridging the rights now guaranteed by the Act to each of these groups and the further difficulties of devising "remedies" which allot particular groups effective voting control over a sufficient number of districts to assure their proportionate representation in the legislature, boggle the mind. Protecting each particular group, under the "standards" employed by the New York Legislature and approved by the court below, without at the same time trenching on the rights of other protected groups, or failing to respect historic boundaries and to assure compact and contiguous districts, would appear all but impossible.

B. The Use of Race-Conscious Remedies Is Limited.

For reasons of both principle and practicality, therefore, it is vital that any exception to the constitutional condemnation of racial quotas be narrowly confined. And the Courts have indeed confined the permissible use of racially conscious remedies to those instances in which it is deemed necessary to cure racial discrimination and where

no alternative, less invidious way to achieve this end is available. See, e.g., *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission*, 490 F. 2d 387 (2d Cir. 1973); *United States v. Wood, Wire & Metal Lathers Union, Local 46*, 471 F. 2d 408 (2d Cir. 1973).

Thus race-conscious remedies have been utilized by the lower courts to provide relief to victims of individual employment discrimination² and to change the racial composition of work forces whose racial makeup was the product of prior discrimination.³ This Court has yet to decide upon the appropriateness of such relief. And, even in considering remedies to dismantle *de jure* segregated school systems, it has not endorsed use of a "fixed racial balance or quota."⁴

But the use of race conscious remedies to reverse the effects of prior discrimination, because it injects considerations that are customarily forbidden to official decision-making, must be carefully circumscribed. "[T]he task is

2. See, e.g., *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972).

3. *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1971), cert. den. 406 U.S. 950 (1972); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971); see also *United States v. Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), cert. den. 404 U.S. 984 (1971); *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972); *United States v. International Brotherhood of Electrical Workers Local 212*, 472 F. 2d 634 (6th Cir. 1973); *United States v. Wood, Wire & Metal Lathers Union, Local 46*, 471 F. 2d 408 (2d Cir. 1973); *Bridgeport Guardians, Inc. v. Commission*, 482 F. 2d 1333 (2d Cir. 1973). But see *Kirkland and Hayes v. The New York Department of Correctional Services*, 520 F. 2d 420 (2d Cir. 1975).

4. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221, 1227 (1971).

to correct, * * * 'the condition that offends the Constitution.' " *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). Such remedies have been upheld only after an express determination of prior discrimination. That determination, in turn, has rested upon a full and proper record, sufficient to support the finding of discrimination. The remedy has been causally related to the discrimination found to exist and carefully formulated by the tribunal responsible for imposing it.⁵

In the present case, none of these standards is met. As we shall show, a significant redistricting has admittedly been based upon a racial formula for which no one will assume responsibility, embodying a percentage proportion which remains unarticulated, undefended and unsupported in any official determination, unaccompanied by any finding of racial discrimination in prior redistricting, and triggered by an electoral "device"—the failure to print bilingual ballots—which has no causal relationship whatever of any kind to the conditions which the 1974 statute was supposed to correct. To permit legislative district lines to be set on the basis of racial proportions in such circumstances is to sanction a dangerous, ill-advised incursion into the principle of race-free decision-making in general and race-free redistricting in particular.⁶

5. See cases cited *supra*, footnotes 2, 3, and 4.

6. The suggestion that petitioners lack standing to complain because whites are in the majority in a number of districts proportionate to the white population of Kings County as a whole and because white legislative representation from the County more than matches the white proportion in the entire County should be rejected out of hand. Whites in the gerrymandered districts are entitled to race-free districting determinations. The fact that other whites in other

(footnote continued on next page)

C. The Challenged Redistricting Rests Upon a 65% Racial Proportion Which No Responsible Official Determined to Be Appropriate or Required.

Although all parties agree that the redistricting was accomplished by consciously establishing certain districts with a 65% nonwhite population, the 65% formula resembles an illegitimate child whose percentage no one will acknowledge. The state authorities gained the impression that only a minimum 65% nonwhite district would satisfy the United States Attorney General and they proceeded accordingly. The Attorney General disclaims responsibility for this formula and asserts only that the 1972 redistricting failed, in his opinion, to satisfy the Act. Intervenor seeks to defend the rationality of the 65% formula but fail to point to any official determination by any responsible official adopting, explaining or justifying it.

The constitutional imperative of color blind decision making cannot be so casually overridden. Even if a limited exception is to be recognized for racial preferences required

portions of the County may not be similarly prejudiced (or may, indeed, be advantaged by the racially conscious concentration of nonwhites in certain districts) does not detract from the Constitutional deprivation visited upon petitioners or their standing to complain. Theirs are individual and personal rights which have been invaded and the deprivation does not depend on the electoral strength of their racial group as a whole. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); see *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). In fact, the very use of a standard which determines injury, in this context, by evaluating whether there is proportionality between the percentage of districts controlled by different racial or ethnic groups and these groups' percentage in the population is constitutionally impermissible. It necessarily imparts into the districting process concepts of racial proportional representation alien and abhorrent to our electoral system.

to overcome past racial discrimination, at the very least the official determinations embodying that exception must clearly and precisely express both the facts justifying such relief and the precise remedy called for. On this record, the necessary underpinning for the racial quotas embodied in the enactment under challenge is wholly lacking.

D. There Was No Affirmative Finding that the 1972 Apportionment Was Designed to Reduce or Suppress Minority Representation.

The majority below argued that the state's prior use of the literacy test and untranslated English ballot coupled with the 1972 redistricting constituted "invidious discrimination in favor of white voters and against nonwhites * * *" and thus justified the 1974 racial gerrymander. (510 F.2d 525).

As we shall show below, the mere existence of trigger factors unrelated to redistricting—here an English-only ballot and low levels of minority voting—do not warrant the extraordinary remedy of drawing district lines to assure to certain races voting control of particular legislative districts. Nor, contrary to the implications in the majority opinion below, did the Attorney General affirmatively find such "invidious discrimination" in the drawing of the 1972 lines as to give constitutional sanction to such a remedy. The Attorney General stated:

First, with respect to the Kings County congressional redistricting, the lines defining district 12 and surrounding districts *appear* to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black

and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our own analysis reveals none. Moreover, it appears that other rational and compact alternative districting could achieve population equality without such an effect. (Emphasis added.)

Senate district 18 *appears* to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population *appears* to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. (Emphasis added.)

He concluded:

* * * on the basis of all the available demographic facts and comments received * * * as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color, we have concluded that the proscribed effect *may* exist in parts of the plans in Kings and New York County. (Emphasis added.)

We recognize, of course, that the process of legislative apportionment can be used to disfranchise voters and that it has been so used against non-whites. It is for that reason that this Court held, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), that apportionment measures were included among those that must receive review under Section 5 where the trigger provisions of Section 4 are operative.

But the Attorney General's decision does not rise to an affirmative finding that the 1972 apportionment, in so far as it affected Kings County, was employed for that purpose or had that effect. It does not provide an adequate substantive or procedural foundation for a reversal of the long-standing judicial policy that race should not be a determinant in drawing district lines.

As a substantive matter, the Attorney General's analysis hardly presents a convincing case of discriminatory abridgement of minority political strength. Minority voters, like political scientists, are not of one mind as to whether minority political strength is maximized by creating strong political blocs in a large number of districts or concentrating the overwhelming number of votes in a few "safe" minority districts. In *Wright v. Rockefeller*, 376 U.S. 52 (1964), minority voters challenged a district plan allegedly drawn on racial lines and designed to concentrate Blacks in safe Negro districts. The Court rejected the challenge for failure of proof but noted in passing that "some of these voters * * * would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable * * *." 376 U.S. at 57-58.

But even if the Attorney General's 1972 opinion were based on appropriate standards of possible abridgement, his negatively couched, ambivalent ruling cannot provide an adequate constitutional foundation for a racial gerrymander.

All that the Attorney General was required to find under the Voting Rights Act, in order to disapprove the change submitted to him, and the most that can be read into his actual findings, was that the State of New York had not sustained its legal burden of proving that the 1972 plan would not have the effect of abridging the right to vote on grounds of race and color.⁷ In actuality, however, ambivalence faded into ambiguity, for the Attorney General did not even find that this "would" be its effect, only that it "may." The Attorney General's ambivalent and negatively couched finding with respect to the 1972 New York redistricting statute may well have been consonant with his obligation under the Voting Rights Act. It cannot, however, form a factual predicate or justification for a redistricting law embodying a blatant, purposeful racial classification.

In cases alleging infringement of the 14th and 15th Amendments arising out of a racial gerrymander, the burden of proof is on the challenging party to affirmatively establish the presence of discrimination. See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); *Cousins v. City Council of City of Chicago*, 503 F.2d 912 (7th Cir. 1974). This no doubt reflects the Court's reluctance to invade the political process of redistricting in the absence of clear proof of discrimination against racial or ethnic minorities. Section 5 of the Voting Rights Act, however, was enacted to provide a time-

7. Three judges of this Court have already expressed the view that even in such circumstances the Attorney General, in passing on the acceptability of voting changes under Section 5, should be required to invoke its provisions only when he is able to make an affirmative finding of discrimination rather than an ambivalent one. See the dissents of Justice Powell, Rehnquist and White in *Georgia v. United States*, 411 U.S. 526, 545 (1973).

saving administrative device to prevent the state legislatures from creating new discriminatory mechanisms to nullify hard won litigation victories against voting discrimination. The shifting of the burden "has resulted in objections to many changes that could not have been judicially enjoined because the burden of proving discrimination could not be met." Derfner, *Discrimination and the Right to Vote*, 26 Vanderbilt L. Rev., 523, 581 (1973).

It would be ironic if a finding, based on a standard of proof which was devised merely to obtain a speedy determination of the limited question of whether a state must go back to the drawing board in the drafting of voting legislation, should be used as the factual basis for giving judicial sanction to state enactments which purposefully classify voters by race. It would be a gross distortion of constitutional standards to permit a procedure such as this, implemented by a determination such as the Attorney General issued in this case, to breach the barrier to legislative redistricting by racial quota.

E. There Is No Relationship Between the "Remedy" and the Violation Which Triggered Operation of Section 5 of the Act.

The rationale permitting considerations of race to enter into remedies designed to correct past discrimination requires that the correction be intimately related to the particular violation and the harm it created. "[T]he nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738 (1974); *City of Richmond v. United States*, 95 S.Ct. 2296 (June 24, 1975). Here no such relationship exists; the "foul" under the Voting Rights Act which triggered the operation of Section 5

relied on by the Court of Appeals majority had nothing to do with the type of legislative apportionment adopted for Kings County in 1974 (510 F.2d at 517). Kings County became subject to the approval requirements of Section 5 of the Voting Rights Act because (a) a literacy test had been in effect on November 1968; (b) it had been found that less than 50% of the persons of voting age were registered or had voted in November 1968; and (c) although that literacy test was no longer in effect and New York State had been viewed as being in full compliance with the statute, a United States District Court had ruled that New York had violated the Voting Rights Act because it conducted an election with ballots in English only, a circumstance which did not affect voting by Blacks or representation of Blacks.

The state legislative policy that shaped the 1974 statute—compelled, the draftsmen believed by the Attorney-General's guideline—was that the Black and Puerto Rican minority viewed as a unitary bloc must have a substantial majority in a specified number of legislative districts. This consideration is totally unrelated to the evil that had caused the Voting Rights Act to be invoked—the disenfranchisement of non-English speaking voters through use of English-only ballots.

The victims of this practice were the Spanish-speaking minority *alone*, not the Blacks. Even assuming it were constitutionally appropriate to correct the failure to print ballots in Spanish by so incongruent a device as redrawing district lines, the 1974 lines did not assure or even create the potential of increased specific representation of the

Puerto Rican group. (See the Department's Memorandum of Decision, July 1, 1974, pp. 14-16.)

As the dissent below points out (510 F. 2d 512, 529 n. 4), the Puerto Rican group viewed their electoral goals and interests as different from those of Black voters. They "resisted being submerged by Black minorities or pluralities to make nonwhite majorities" and sought separate representation. Thus the "remedy" of drawing district lines to give an artificially created "nonwhite" bloc working control of certain districts was no remedy at all. It had no relationship to the injury suffered by the Puerto Ricans as a result of the untranslated ballot. It did, however, give an unjustified preference, in certain newly-created districts, to Black voters who had been neither injured by a literacy test nor harmed by the English-only ballot.

The redrawing of district lines to give working control to minorities does not effect a cure of the evil caused by a literacy test or ballot infringement. That cure is effected by the elimination of the improper test and the printing of the ballot in the appropriate language. At that point the disadvantage to the minority voter is remedied and he can then go to the polls at the next election and achieve the representation due him in the newly-elected legislature.

In order to assure that the remedy is not nullified by further subterfuge, the Voting Rights Act requires that any changes in voting qualifications or procedures, including redistricting, must be approved by the Attorney General or the United States District Court of the District of Columbia. Nowhere, however, does that Act and its recent

hotly debated extension, require or even authorize, as a remedy for any past possible underrepresentation which may have resulted from literacy tests or English-only ballots, the drawing of district lines to guarantee working control in particular districts to the minorities who might have been affected by these devices. It is doubtful, to say the least, that such a legislative mandate—and there is none—could pass Constitutional muster.

Conclusion

For the foregoing reasons, we respectfully urge that the judgment of the Court of Appeals be reversed and New York's 1974 reapportionment declared unconstitutional under the Fourteenth and Fifteenth Amendments.

Respectfully submitted,

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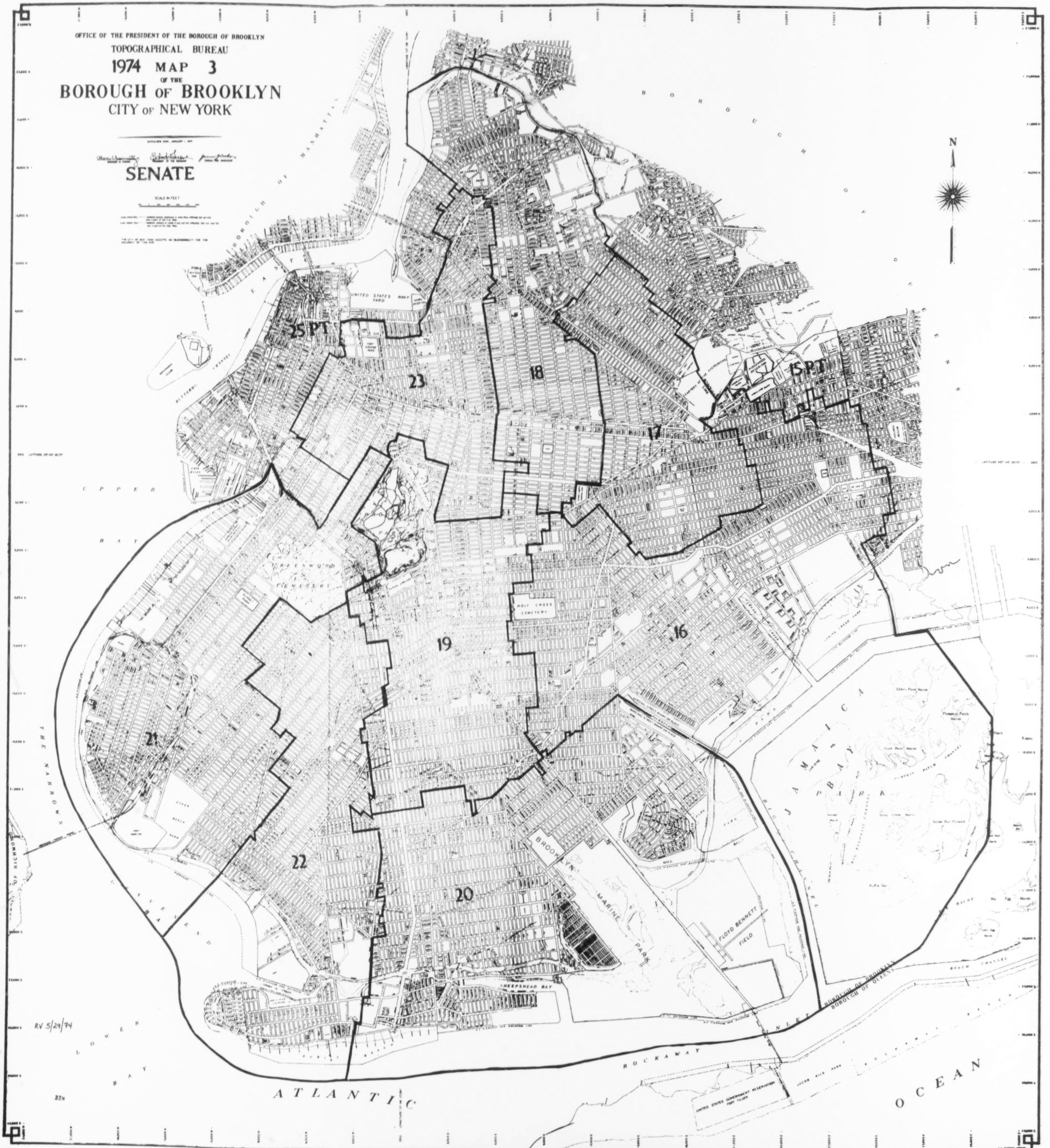
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OFFICE OF THE PRESIDENT OF THE BOROUGH OF BROOKLYN
TOPOGRAPHICAL BUREAU
1974 MAP 1
OF THE
BOROUGH OF BROOKLYN
CITY OF NEW YORK

ASSEMBLY



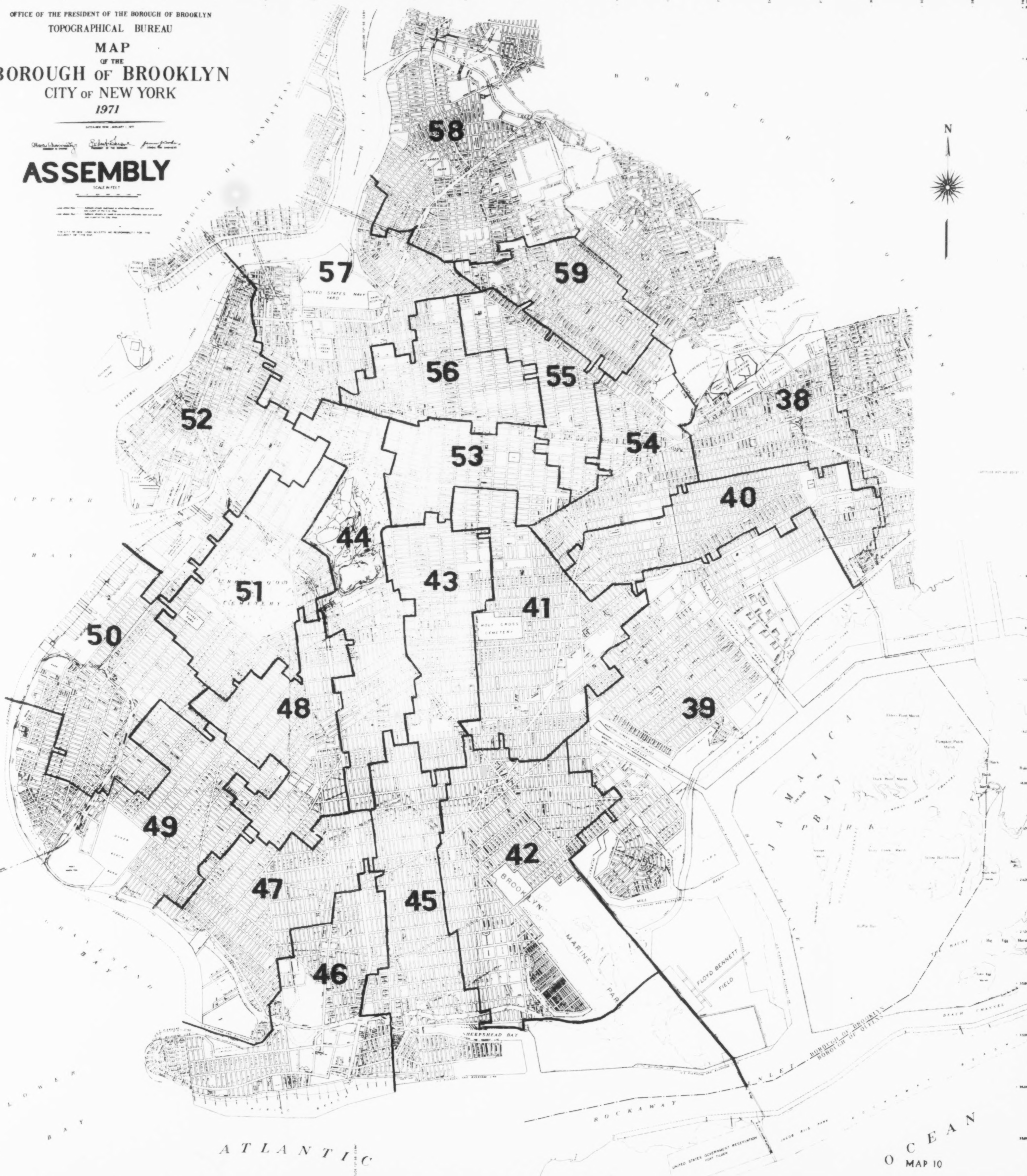


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OFFICE OF THE PRESIDENT OF THE BOROUGH OF BROOKLYN
TOPOGRAPHICAL BUREAU
MAP
OF THE
BOROUGH OF BROOKLYN
CITY OF NEW YORK
1971

ASSEMBLY

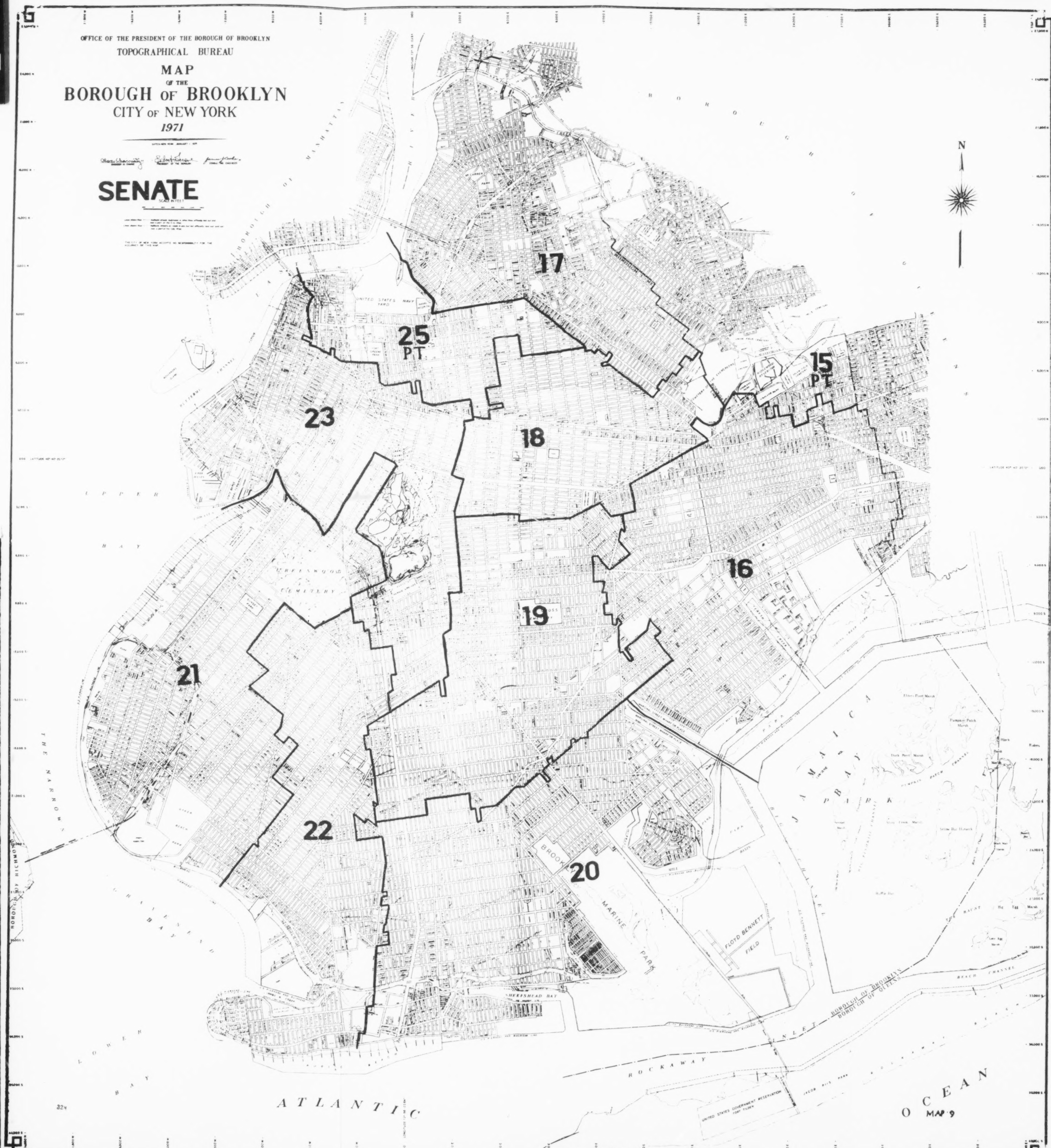
SCALE IN FEET
1" = 1000'



4

OFFICE OF THE PRESIDENT OF THE BOROUGH OF BROOKLYN
TOPOGRAPHICAL BUREAU
MAP
OF THE
BOROUGH OF BROOKLYN
CITY OF NEW YORK
1971

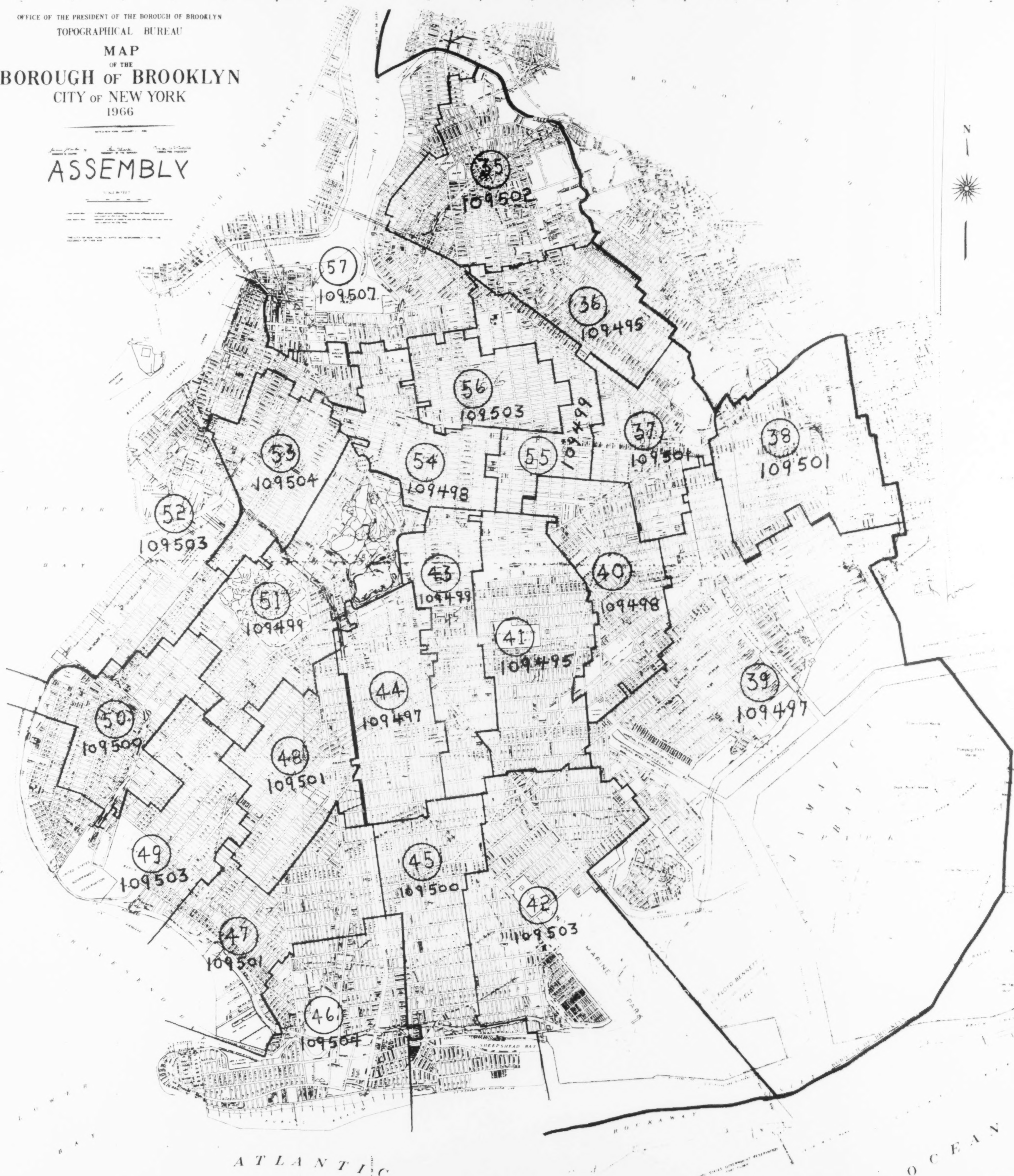
Charles G. ...
...
SENATE



5

OFFICE OF THE PRESIDENT OF THE BOROUGH OF BROOKLYN
TOPOGRAPHICAL BUREAU
MAP
OF THE
BOROUGH OF BROOKLYN
CITY OF NEW YORK
1966

ASSEMBLY



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OFFICE OF THE PRESIDENT OF THE BOROUGH OF BROOKLYN
TOPOGRAPHICAL BUREAU
MAP
OF THE
BOROUGH OF BROOKLYN
CITY OF NEW YORK
1966

SENATE
SCALE IN FEET

